SOPREME COURT. IN

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 40- 16

JERRY DOUGLAS MEMPA, PETITIONER,

VS

B. J. RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY

ON WRIT OF CERTIOBARY TO THE SUPREME COURT OF WASHINGTON

PETITION FOR CERTIORARI FILED AUGUST 8, 1966 CERTIORARI GRANTED FEBRUARY 18, 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 424

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VS.

B. J. RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY

ON WRIT OF CERTIORARY TO THE SUPREME COURT OF WASHINGTON

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[fol. 1]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Cause No. 38470

In the matter of an Application For a Writ of Habeas Corpus of Jerry Douglas Mempa, Petitioner,

VS.

B. J. Rhay, as Superintendent of the Washington State.
Penitentiary at Walla Walla, Washington, Respondent

PETITION FOR A WRIT OF HABBAS CORPUS

To: The Honorable Chief Justice of the Above Entitled Court:

This is an original, verified application and petition for a Writ of Habeas Corpus of Jerry Douglas Mempa, acting pro se, and he alleges, maintains, contends, and prima facie shows:

1

(1) That petitioner is not imprisoned, detained, or confined pursuant to any valid order, decree or judgment issued out of a court of competent jurisdiction.

II

- (2) That your suppliant is illegally and/or unlawfully confined and incarcerated in the Washington State Penitentiary at Walla Walla, Washington by the Superintendent thereof, B. J. Rhay.
- (3) That the cause of and/or pretense of petitioner's illegal and unlawful incarceration and confinement is a judgment and sentence issued out of the Superior Court of the State of Washington, in and for the County of Spokane, in Cause no. 16277, on the 17 day of June, 1959, for the alleged crime of taking a motor vehicle without permission of the owner.

- (1) That the said judgment and sentence was entered in said cause no. 16277, on the 17 day of June, 1959, pursuant to and in accordance with a plea of guilty entered by this petitioner on the 17 day of June, 1959, at which time he was represented by counsel, and petitioner received probation and was released.
- (2) Whereas, on the 23 day of October, 1959 petitioner was brought before the trial court and probation was revoked, at which time the petitioner was sentenced to the State Reformatory for not more than ten years, at which [fol. 2] time he was not accompanied by counsel nor represented by counsel at the time of his appearance before the trial court for the imposition of final judgement and sentence upon the revocation of his probation in the Superior Court of the State of Washington for Spokane County, on the 23 day of October, 1959, at which time he was entitled to representation by counsel pursuant to Art. 1. Section 22 of the State Constitution and the 6th Amendment to the Constitution of the United States. For a case the same as the foregoing one, see: Washington State Supreme Court Cause No. 37455. In re Saylors vs. Rhay. Also see: People vs. Havel, 134 Cal. app. 2d 218, 218, 285, p. 2d 317 220; wherein it was held in the pertinent part as follows:

"It is a fundamental principle that persons charged with and convicted of public crimes are entitled to the services of their attorneys at all stages of the proceedings, and this includes arraignment for final judgement when defendants are asked if they have any legal cause to show why judgment should not be pronounced. A defendant does have certain substantial rights at that time and it may be only a trained legal mind that would understand the significance of this querry."

Additionally, in State vs. Shannon, 60 Wn. 2d. 883, 889, 376, p.2d 646; This Court held and stated:

"Imposition of sentence, following revocation of probation, particularly in felony cases, is part of the criminal prosecution within the Constitution Art.1, section 22 (Amendment 10) at which time a defendant is entitled to be represented by counsel. In re Mc-Clintook vs. Rhay, 52 Wn. 2d 615, 328, p.2d 369; in re Levi, 29 Cal. 2d 41; 244 p. 2d 403.

IV

Therefore, petitioner submits that in the case at bar the petitioner appeared before the trial court for arraignment for the imposition of judgmnt and sentence, unaccompanied by counsel to represent him, contrary to his constitutional rights under Art. 1. section 22 (amendment 10) as construed by this Court in State vs. Shannon. Supra.

Wherefore, petitioner respectfully submits that his criminal cause should be remanded to the Superior Court of the State of Washington for Spokane County with directions to vacate the judgment and sentence and return him to the said Superior Court for rearraignment for the imposition of judgment and sentence, at which time he should have counsel represent him, and that judgment and sentence be re-entered Nunc Pro Tunc.

[fol. 3] Respectfully Submitted, Jerry Douglas Mempa, W.S.P. #118347, P.O. Box 520, Walla Walla, Washington 99362. STATE OF WASHINGTON, County of Walla Walla, ss:

JERRY DOUGLAS MEMPA, being first duly sworn on oath, deposes and says: That he is at all time the petitioner named in the foregoing application for a Writ of Habeas Corpus; and that he has read and signed same and knows the contents thereof, and same are true.

Jerry Douglas Mempa.

Subscribed and Sworn to before me this 15 day of July, 1965.

Raymond C. Bannister, Notary Public in and for the State of Washington, residing in Walla Walla, County.

[SEAL]

[fel. 4] Affidavit of Service by Mailing, Omitted in printing.

[fol. 5] Motion for Leave to Proceed in Forma Pauperis, Omitted in printing.

[fol. 6] In the Supreme Court of the State of Washington

No. 38470

[Title omitted]

RETURN AND ANSWER-Sworn to October 29, 1965

Comes now the respondent, B. J. Rhay, Superintendent of the Washington State Penitentiary at Walla Walla, Washington, by and through his attorneys, John J. O'Connell, Attorney General of the State of Washington, and Lee D. Rickabaugh, Assistant Attorney General, and for return to the application of Jerry Douglas Mempa for a writ of habeas corpus alleges:

I

That the respondent, B. J. Rhay, is the duly appointed, qualified and acting Superintendent of the Washington State Penitentiary at Walla Walla, Washington, a state correctional institution for the confinement and rehabilitation of convicted felons sentenced and committed thereto by the Superior Courts of the State of Washington.

П

That the respondent, B. J. Rhay, as Superintendent of the Washington State Penitentiary has in his custody and confinement in the Washington State Penitentiary the petitioner, Jerry Douglas Mempa, pursuant to and in accordance with judgment and sentence and warrant of commitment rendered by the Superior Court of the State of Washington for Spokane County on October 23, 1959, under that [fol. 7] court's Cause No. 16277, wherein it appears that the petitioner was convicted of the crime of "violating section 9.54.020 of the Revised Code of Washington, commonly known as Joy-Riding", and sentenced to a maximum term of confinement of not more than ten years. That certified copies of the said judgment and sentence and warrant of commitment are attached hereto and by this reference incorporated herein as though fully set forth.

Further and for Answer, the respondent denies each and

every material allegation and thing contained in the application of Jerry Douglas Mempa for a writ of habeas corpus except such allegations thereof as may hereinafter be affirmatively admitted in the respondent's answer and defense.

Further and by way of Affirmative Answer and Affirmative Defense respondent alleges:

I

That the petitioner was charged by Information filed in the Superior Court of the State of Washington for Spokane County, under that court's Cause No. 16277, with having committed the crime of "violating section 9.54.020 of the Revised Code of Washington, commonly known as Joy-Riding", as more fully set forth and alleged therein, and that a certified copy of said Information s attached hereto and by this reference incorporated herein as though fully set forth.

п

That thereafter and on or about the 17th day of June. 1959, the petitioner was arraigned before the said Spokane County Superior Court being at that time accompanied by and represented by his attorney, Willard Roe, a duly licensed and practicing attorney in the State of Washington, residing in Spokane County, and, having been fully advised. of his rights, the petitioner entered a plea of Guilty to the [fol. 8] said charge of "violating section 9.54.020 of the Revised Code of Washington, commonly known as Joy-Riding", and was at that time placed on probation for a period of two years. That a certified copy of the said Order of Probation is attached hereto and by this reference incorporated herein as though fully set forth. Thereafter, and on or about October 23, 1959, the petitioner having violated the terms of his probation, the said probation was revoked on said date and the said petitioner was sentenced by the said court, as aforesaid, to a maximum term of imprisonment of not more than ten years, and that the petitioner herein is properly in the custody of the respondent pursuant to said judgment and sentence and that the maximum term of imprisonment thereon has not expired. That certified copies of the Notice of Revocation of Probation and Order Revoking Probation are attached hereto and

by this reference incorporated herein as though fully set forth.

III

That attached hereto and by this reference incorporated herein as though fully set forth is an affidavit of Richard J. Schroeder, Deputy Prosecuting Attorney for Spokane County, which said affidavit is so attached and incorporated herein for the purpose of answering certain of the contentions made by the petitioner in his application for writ of habeas corpus.

Wherefore, the respondent having made his return and fully answered the application of Jerry Douglas Mempa for a writ of habeas corpus prays that the same be denied and that the proceedings be dismissed.

Respectfully submitted, John J. O'Connell, Attorney General. Lee D. Rickabaugh, Assistant Attorney General.

[fol. 9] Duly sworn to by Lee D. Rickabaugh, jurat omitted in printing.

[fol. 10]. ATTACHMENT TO RETURN AND ANSWER

In the Superior Court of the State of Washington in and for the County of Spokane

No. 16277

STATE OF WASHINGTON, Plaintiff,

VS.

JERRY D. MEMPA, Defendant.

Information—Filed May 26, 1959 (RCW 9.54.020)

Comes now the Prosecuting Attorney in and for Spokane County, Washington, and charges the defendant, Jerry D. Mempa, with the crime of violating Section 9.54.020 of the Revised Code of Washington, commonly known as "Joyriding," committed as follows:

That the said defendant, Jerry D. Mempa, in the County of Spokane, State of Washington, on or about the 25th day of April, 1959, then and there being, did then and there willfully, unlawfully, and feloniously, without the permission of the owner or person entitled to possession thereof, intentionally take and drive away a motor vehicle, to wit: a 1956 Chevrolet automobile, Washington License No. CBS-454, the property of Bert Sampson.

John J. Lally, Prosecuting Attorney in and for Spokane County, Washington. By Howard A. Anderson, Deputy.

STATE OF WASHINGTON, County of Spokane, ss:

Howard A. Anderson, being first duly sworn on oath, deposes and says: That the above and foregoing information is true as he verily believes.

Howard A. Anderson.

Subscribed and sworn to before me this 26th day of May, 1959. [Illegible], Deputy County Clerk.

[File endorsement omitted.]

[fol. 11] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR COUNTY OF SPOKANE.

No. 16277

STATE OF WASHINGTON, Plaintiff,

V.

JERRY D. MEMPA, Defendant.

Transcript of Proceedings, June 17, 1959

Be it Remembered:

That the above entitled cause came on for hearing on the 17th day of June, 1959, before the Honorable Louis F. Bunge, Judge of the Superior Court of the State of Washington, in and for the County of Spokane, Washington; the plaintiff being represented by Howard A. Anderson, Deputy Prosecuting Attorney for Spokane County, Washington; [fol. 12] the defendant being personally present and being represented by Willard J. Roe, his attorney; and both sides having announced that they were ready, the following proceedings were had, to wit:

Mr. Anderson: If the Court please, this is a matter, State of Washington v. Jerry D. Mempa, Superior Court No. 16277. The defendant is present in court at this time. He is represented by his attorney, Mr. Willard Roe, and we are here for the purpose of an arraignment.

The Court: Is that correct, Mr. Roe? You are here for

the purpose of an arraignment?

Mr. Roe: Yes, your Honor.

Mr. Anderson: Is your true and correct name Jerry D. Mempa.

Mr. Mempa: Yes.

Mr. Anderson: Mr. Roe, you have received a copy of this information?

Mr. Roe: I have.

Mr. Anderson: Jerry D. Mempa, has the Deputy Sheriff read the warrant to you?

Mr. Mempa: Yes.

Mr. Anderson: Jerry D. Mempa, you are charged by

complaint filed in this court with the crime of violating Section 9.54.020 of the Revised Code of Washington, commonly known as "Joy-riding," the charging part of the information reading as follows: That you, "Jerry D. Mempa, in the County of Spokane, State of Washington, on or about the 25th day of April, 1959, then and there being, did then and there willfully, unlawfully, and feloniously, without the permission of the owner or person [fol. 13] entitled to possession thereof, intentionally take and drive away a motor vehicle, to wit: a 1956 Chevrolet automobile, Washington License No. CBS-454, the property of Bert Sampson."

The Court: You have 24 hours within which to enter a plea. Do you want to plead now or wait the 24 hours?

Mr. Mempa: Plead now.

The Court: How old are you Jerry?

Mr. Mempa: Seventeen.

The Court: When will you be eighteen?

Mr. Mempa: Next May. Mr. Roe: May 14th.

The Court: You have just turned seventeen, then?

Mr. Mempa: Yes.

The Court: Where is your home?

Mr. Mempa: Spokane.

The Court: Are your parents here in court?

Mr. Mempa: Yes.

The Court: What is your plea to the crime of joy-riding as just read to you by the deputy sheriff—guilty or not guilty?

Mr. Mempa: It's guilty.

The Court: All right. You may be seated.

Mr. Anderson: If the Court please, the record for the defendant, Jerry Mempa, as a juvenile, in accordance with what Jerry Mempa has stated to me, on December 19, 1955, at a time when he was thirteen years of age, was before the juvenile officers for burglary. At that time he was detained one week in the juvenile home, and placed on an official probation.

When he was 14 years of age, on April 9, 1956, he was before the juvenile court for a burglary and malicious [fol. 14] vandalism, and at that time, on April 13; 1956, he was placed in the State Training School at the Green Hill Academy, in Chehalis, Washington. He remained

there until December 24, 1957, when he was released to his parents.

On February 13, 1958, he was found with wires in his possession that were commonly used to "hot-wire" automobiles. He was placed in the detention home because of this, and on that evening or the following day, there was an attempted break-out from the detention home. Jerry Mempa was one of the parties; however, he states it wasn't his idea or plan, but he had agreed to participate in it. As a result of this conduct, on February 14, 1958, he was returned to the Green Hill Academy in Chehalis, Washington.

On March 24, 1958, because of a riot that had occurred at the Academy, the school authorities or officers refused to keep Jerry Mempa there any longer, and he was returned to Spokane County. At that time, in March of 1958, he was sent to Eastern State Hospital on petition, for a psychopathic delinquent. He was transferred to the Diagnostic Center at Fort Worden, Washington, where he remained approximately ten days, and then he was transferred to Western State Hospital. The authorities at Western State Hospital were of the opinion that he was a psychopathic delinquent, and he was returned to Spokane County for the authorities to take what action they felt was necessary.

A petition was then filed placing him for observation again at Eastern State Hospital as a possible psychopathic [fol. 15] delinquent. The staff at Eastern State Hospital felt that he was not a psychopathic delinquent, and this petition was then dismissed and Jerry Mempa was returned to his home in Spokane.

As he stated, he is seventeen years of age. He was born in Butte, Montana, on May 14, 1942. He has a fourteen-year-old brother who is a student at North Central High School. Jerry Mempa was raised by his grandparents until 1952, at which time he left. He then lived with his mother and his stepfather; they reside at 2518 East Trent. His stepfather is a barber. As far as his education is concerned, he didn't quite finish the eighth grade.

As to the circumstances of this particular case, your Honor, on the evening of April 24, 1958, David Grant and Jerry Mempa were together. David Grant is also a juvenile boy—he has not reached eighteen. The two of them went to Al's Auto Sales, at East 3108 Sprague. Now, the stories

are a little conflicting as to just what happened, and David Grant states that Jerry Mempa had a ring of keys, and that he used one of these keys in a 1953 Chevrolet, and that he drove the Chevrolet away and David Grant rode in the car with the defendant. Jerry Mempa states that David Grant was the person that had the ring of keys, and that David Grant drove this car away, and that Jerry Mempa then got in. At any rate, the two boys admit that they both drove this 1953 Chevrolet, they both rode in it, it was taken without permission. During the course of the evening, at approximately 11:00 p.m., they stopped by the [fol. 16] home of Charles Dickerson, who lives at East 1904 Hartson, and Charles Dickerson, David Grant and Jerry Mempa then drove the car around the southeast section of town until it finally ran out of gas in the 1900 block on East 6th.

At that time the car was abandoned and the hub caps and fender skirts were taken from this car and placed in the garage of a relative of Charles Dickerson.

The following evening—now, this is the charge that has been filed against the defendant—on April the 25th of this year, Jerry Mempa and David Grant both rode and drove the 1956 Chevrolet that was taken from the garage at South 309 Haven. This is a private garage where the car was taken. Again the stories are a little bit in conflict. Jerry Mempa states that David Grant came to Mempa's home in this car and stated that it was a car that belonged to a relative of his, and they then drove in it, Jerry Mempa had not yet driven this car and later on found out that the car had been taken without permission because when Grant would see a policeman or an officer, he would immediately turn and go on some side street. David Grant states that Jerry Mempa—again using this ring of keys, that he hadwent into the garage at this address and the key fit this 1956 Chevrolet and that they then drove it. This car was driven during the evening of April 25th of this year by both boys, Jerry Mempa and David Grant. It was then parked near a park. The following day, on April 26th, both boys, Jerry Mempa and David Grant, returned to the car and they drove the car that day until the transmission [fol. 17] on this 1956 Chevrolet finally gave out. Jerry Mempa states that he drove it for about two miles in reverse, and then parked it.

The people at South 308 Haven informed the police that they thought a neighbor boy might have had something to do with that, and that neighbor was David Grant. He was picked up by the police department, questioned, and he admitted everything that occurred pertaining to these cars. He was sent by the juvenile court to the Green Hill Academy

at Chehalis, Washington.

At approximately 7:00 p.m. April 28th of this year Jerry Mempa, the defendant, was picked up; he was placed in the juvenile detention home. His officer, Mr. Jim Davis, was talking to him on April 29th of this year. As Mr. Davis was taking Jerry Mempa back to where he was being detained, the defendant broke away from the officer and ran out of the building and fled that particular area. The juvenile court remanded this particular case to the prosecutor's office on May 1st of this year, and then on May the 18th of this year, Jerry Mempa, accompanied by his stepfather, Mr. Dickerson, came in on their own to the Spokane County Sheriff's office and he turned himself in at that time. He has been in custody ever since.

The Court: Where at?

Mr. Anderson: In the Spokane County jail, your Honor.

The Court: Mr. Roe!

Mr. Roe: I think your Honor may have had some previous acquaintance with this case.

The Court: Quite a little.

[fol. 18] Mr. Roe: I was appointed to defend this man by Judge Kelly after he had been in jail some time, and statements had been taken from him and also the other participants, and it's clear beyond all reasonable doubt, as far as I'm concerned, that this crime was committed and this man is guilty. It's a sorry recital, obviously, of this boy's previous three or four years. The only one bright light, and one that I think should commend itself to the Court, is the fact that he gave himself up voluntarily on May 18th, after he successfully made an escape from the juvenile, and he has been in jail now for a month today.

He is a product of a broken home, he has been knocked about from early infancy, he hasn't even finished the eighth grade. At the time he first got into trouble—I believe this is correct, though Mr. Anderson can correct me if it's wrong—it was his participation in the burglary of a surplus store. The others were given probation and I believe one left the

estate, but only Jerry was sent to Chehalis, where he served eighteen months or so.

He has been pushed around even by the state, from one institution to another, from Chehalis to Western State to Eastern State; he has been knocked about by them. He hasn't been given a real break by the state yet. Even in this last deal, which is the subject of this charge today, your Honor, I believe from my limited information that of the three boys, David Grant, Charles Dickerson and Jerry Mempa, the only one before the Superior Court is Jerry Mempa. I believe that Charles Dickerson—who is no relation to the stepfather, I might add—was given proba[fol. 19] tion. I believe that David Grant was sent back to Chehalis.

Now I know this poses a hard task and a difficult task for the court. I suppose an easy way would be to send him to Monroe. The fact that he is here in Superior Court indicates the gravity of the situation, but nevertheless this: boy is not eighteen. He is just barely seventeen; he was sixteen when this occurred. If there is ever a chance to redeem him for society, or to make him indebted to society. it is now. This is the very last opportunity, it would appear to me. I don't know-I of course don't know the causes, and I doubt if anyone knows certainly the causes, why this boy is in trouble. His mother is here, very concerned, and his stepfather took time off from work to be here. He has another brother, age fourteen, who is a student at North Central High School and is making average grades; and so the home life must be acceptable enough. Not presuming at all upon the Court, but I have attempted to see what we could find for him in the way of work, if he got out of jail or if he was given some sentence in the county jail. It is difficult to find a job for a boy of this record and also his education. I have talked to a Richard Montoya, who runs the Dishman Body and Fender Shop and does tire recapping. He has indicated he would be interested in putting the boy to work. He can't promise a job right now, but he will later, and he can't pay much, but he could pay something to give him something to do. He has never had a real job.

I have also talked to Mr. Paul Cooney, the attorney who [fol. 20] previously represented Mr. Mempa. Mr. Cooney is familiar with this, and of course he has tried to get a

job for the boy, but it didn't pan out, but he has conferred with some of his clients in a light manufacturing enterprise, and they would be willing to take a chance on the boy. It depends on orders given, but there is a possibility around August 1st that there might be a job available there.

I think the Court should look at the case in this light, particularly since you have a previous acquaintance with this matter. The role of a judge in assessing the punishment in a trial, of course, has many factors. One is, of course, the satisfaction of the demands of the state. He has already served more time in detention than many men who have committed much worse crimes than this. If he goes, I suppose that the chip on the shoulder that some of them come out with will be further aggravated. The only hope that I see is to make him realize that society is giving him a break, and that he is indebted to the Court or to society when they did not take advantage of him when they could, and that is by possibly giving him a chance now, so that he will have an understanding and a need to repay society, and possibly with that approach this boy can be saved. Certainly I think this is probably the last time. He has served a month in the county jail. An appropriate term in the county jail, if there was further work which was provided, I think could satisfy the demands of the state and at the same time preserve this young boy, still in his tender youth, for society. I ask that the Court look upon it in that light.

[fol. 21] The Court: Is there anything you want to say,

Mr. Anderson?

Mr. Anderson: No, your Honor.

The Court: Well, gentlemen, the talk that you have made here, Mr. Roe, is almost similar to the one that the other counsel that you mentioned, Mr. Cooney, made. Every lawyer that has had any touch with this case has been convinced, honestly, as I think you are, that something went wrong with this boy somewhere, that he never recognized any of the responsibilities of citizenship. I have been impressed, the previous times that he has appeared before me when I was sitting in juvenile, that his fatherin-law, or his stepfather was very kindly disposed to him. I think his parents both wanted this boy to get along, and were willing to do anything they could do, but apparently what they could do has been very short of what was required

in his case. He has a genius for stealing cars. He will come up with a echanism that he can cross-wire these cars, and he has a positive genius for that. Then he seems to have a genius for getting everybody that has tried to help him charged with the duty of taking care of him and getting entrapped with him. I don't know why-I haven't been in these places-but they don't want him at Green Hill, they don't want him at Medical Lake, and they don't want him at Western State. I don't know why, but it's true. I am inclined to agree with you, Mr. Roe, that this is a crossroads for this boy, this is a critical period in his life, but what I am disturbed by is that we, in juvenile, have given his parents and everybody else that could be reached a chance to do something with him, and everybody [fol. 22] has failed, and society keeps on suffering from his misdeeds. I venture to say that when he is out of the institution again, it won't take him ten days to get back in. They will pick him up somewhere—that's what concerns me. Have you any program or anything in mind? Have you tried to impress him with the necessity of abiding by the laws of society, Mr. Roe-that would help us in any way that would offer some hope to get him to realize his position?

Mr. Roe: I have, your Honor, and I have told him that

he can't beat society.

The Court: Have you convinced him?

Mr. Roe: Well, he appears convinced to me, in jail, but I can't guarantee that my suggestion will stick. It is not pleasant in the county jail. I think—now is the first time he has been in a real jail, and possibly leaving him there for a few months—that's twice as hard as serving any place else. Maybe we can have some job available, maybe, during the summer, with Mr. Cooney or this tire recap under strict supervision, with a good dose of county jail time. Your Honor, I think it is the only hope. If he is ordered to the reformatory, I am afraid he is gone. Sixteen when this happened—or this happened before the age of sixteen—he is not too old to be turned.

The Court: Mr. Davis has a way with boys that is quite effective, and he did everything in the world that he could with this young man, and there just seems no influence of any kind that could reach him that I know of. After serving three years, from 1935 to 1938, in the position of Chairman

[fol. 23] of the Parole Board, I am convinced of something that an old parole officer of many years of experience told me, that the hardest time, as far as pure punishment is concerned, that a prisoner serves is either in the county jail or a penitentiary in the first thirty days that he is there. After that time, he becomes case-hardened, he doesn't have the same reaction to his punishment and there's nothing gained except as far as society is concerned. But he bothers me very much. For that time he was in, he was falsifying with respect to how he got the new mechanism that he had, and he seems to be able to draw the boys to him, which is distressing, in these escapes. Now, I realize there is a sort of code among these delinquents where they say they can steal five cars before anything serious will happen to them, but most of those boys, we can send them over to the training school and they come back and don't get into any more trouble, and this boy does have trouble. I have had letters from psychiatrists at our institutions; they have examined him; they can't convince themselves that he is insane; he is just apparently delinquent, and that's all.

You may stand up. Is there anything you want to say on your own behalf before the judgment of the Court is pro-

nounced in this case?

Mr. Mempa: No sir.

The Court: Why is it, Jerry, that you won't listen to reason about your troubles!

Mr. Mempa: I listen.

The Court: We can't hear you. Mr. Mempa: I said I listen.

The Court: Well, you never listened to your stepfather, did you?

[fol. 24] Mr. Mempa: No.

The Court: He always treated you all right, didn't he?

Mr. Mempa: Yes.

The Court: Your mother provided a home for you, you had an opportunity to go to school, but you missed it every time, isn't that right?

Mr. Mempa. Yes sir.

The Court: And your mother has always been kind to you, hasn't she?

Mr. Mempa: Yes.

The Court: They don't want you to do this sort of thing. Now, you made some promises to Mr. Cooney, your other lawyer, didn't you? You told him you were going to stay out of trouble—didn't you say that to him?

Mr. Mempa: Yes.

The Court: What hope have I, what assurance have I to turn you loose on society once again?

Mr. Mempa: Well, I think I would make it this time.

The Court: You think you would make good?

Mr. Mempa: Yes.

The Court: How far did you get in school?

Mr. Mempa: I didn't get quite through the eighth grade.

The Court. What was the reason? Were you getting along all right in the eighth grade when you were pulled in the last time?

Mr. Mempa: Yes.

The Court: Why did you run from Mr. Davis over at the

juvenile?

Mr. Mempa: Well, he said he was going to remand me to Superior Court, and told me the sentence would probably be ten years, I would probably go to Monroe.

[fol. 25] The Court: What justification would I have now to let you go after you have served another thirty days in the county jail? Do you think you have learned something out of this?

Mr. Mempa: Yes.

The Court: Do you think you can resist from now on, if you served another thirty days down there, could you resist and steer another course now?

Mr. Mempa: Yes.

The Court: You don't say that very convincingly, young man.

Mr. Mempa: I could.

The Court: Anything else you want to say?

Mr. Mempa: No.

The Court: Very well. It is the further judgment of the Court that you be confined in the institution for a maximum period of ten years. Now, I am going to suspend every bit of that except thirty days. I want you to serve thirty days actually on this. I want to point out to you now that when you are released you are going to be under observation not of the juvenile officers, but of the state parole officers. Those men know their business. They are kindly disposed. They will be there for the purpose of seeing that you don't get back here again. Take advantage of this, or you are

going to be back here. You are absolutely on your own now. Mr. Roe can't help you, and no one else can help you, and if you steal a car, you are going to Monroe and you are going to stay there.

I would think that you would realize that this is a real opportunity, and that you would behave yourself from now on. [fol. 26] Mr. Anderson: Your Honor, actually what you

are doing is placing the defendant on probation?

The Court: Yes, that is the effect of it. Except that he has served 15 days, I could make it for a period of two years. I should have done that.

Mr. Roe, will you undertake to tell him once more for his own behalf that it is up to him from here on, now, that he become a good citizen.

Mr. Roe: Yes sir, I will.

The Court: This is a probationary order, Mr. Roe, with the exception of his serving thirty days. I think it's regrettable that he has not finished his schooling, at least his eighth grade, and if there's any hope of getting him out here to the Industrial School, I would like to see him go. I have signed the order.

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 27] In the Superior Court of the State of Washington for Spokane County

No. 16277

STATE OF WASHINGTON, Plaintiff,

vs.

JERBY D. MEMPA, Defendant.

ORDER OF PROBATION-June 17, 1959

This matter coming on regularly for hearing on this 17th day of June, 1959, defendant appearing in person, and (being represented by Willard Roe, Attorney), and the State of Washington being represented by Howard A. Anderson, Deputy Prosecuting Attorney and the defendant having entered his plea of guilty to the charge of violating Sec. 9.54.020, RCW, commonly known as "Joy-riding" as contained in the information, and the Court having found the defendant guilty, and having heard the circumstances of the case and being fully advised in the premises, and it appearing to the Court that the defendant has never before been convicted of any crime and appears to be industrious, it is by the Court

Ordered, Adjudged and Decreed, that the defendant, Jerry D. Mempa, be placed on probation for a term of two Years, and until the further order of the Court, as provided by the Probation Act, and to make such reports as required and be under the supervision of the State Parole Officer during the period of his probation.

It is Further Ordered that as a condition of probation the defendant will be confined in the Spokane County Jail for a period of thirty days.

Done in open Court on this 17th day of June, 1959.

Louis F. Bunge, Judge.

Presented by Howard A. Anderson, Deputy Prosecuting attorney.

CERTIFICATE

STATE OF WASHINGTON, County of Spokane, ss:

I, the undersigned, County Clerk of Spokane County, and ex-officio Clerk of the Superior Court of the State of Washington for Spokane County, do hereby certify the foregoing to be a full, true and correct copy of the Order of Probation, as the same appears on file and of record in my office, and I further certify that said Order of Probation was pronounced, signed and entered in open Court while the defendant was personally present.

Instestimony whereof, I have hereunto set my hand and affixed the seal of said Court this — day of —, 19—.

—, —, Clerk. —, —, Deputy.

Order of Probation.

[File endorsement omitted.]

[fol. 28] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SPOKANE

No. 16277

STATE OF WASHINGTON, Plaintiff,

VS.

JERRY D. MEMPA, Defendant.

Notice-Filed October 23, 1959

To: JERRY D. MEMPA, defendant above named.

You will please take notice that the undersigned Deputy Prosecuting Attorney in and for Spokane County, State of Washington, will submit to the Honorable Louis F. Bunge, Judge of the Superior Court of the State of Washington, in and for the County of Spokane, on the 23rd day of October, 1959, at nine-thirty o'clock A.M., in the courtroom of said Judge in the Spokane County Courthouse at Spokane, Washington, a motion for an order revoking the probation in the above-entitled matter, a copy of which motion is hereto attached, the said defendant having been placed on probation for a period of two years on the 17th day of June, 1959, after his plea of guilty of the crime of Violating Section 9.54.020 of the Revised Code of Washington, commonly known as Joy-Riding on the 17th day of June, 1959, by the said Honorable Louis F. Bunge.

Dated at Spokane, Washington, this 23rd day of October, 1959.

Howard A. Anderson, Deputy Prosecuting Attorney.

Copy of above notice and motion for order to revoke probation received this 9th day of October, 1959.

Jerry Mempa, Defendant.

[File endorsement omitted.]

[fol. 29] In the Superior Court of the State of Washington in and for the County of Spokane

No. 16277

STATE OF WASHINGTON, Plaintiff,

JERRY D. MEMPA, Defendant.

ORDER REVOKING PROBATION—October 23, 1959

This cause coming on regularly for hearing before the Court on the motion of the Prosecuting Attorney in and for Spokane County, State of Washington, by his deputy Howard A. Anderson, for an order revoking the probation entered herein on the 17th day of June, 1959, and the defendant having been duly served with notice of said hearing on said motion to revoke, and said defendant appearing in person, and the Court having examined the records and files herein and having heard the evidence and the admissions of the defendant, the Court finds that the defendant has violated the terms of his probation in that on the evening of September 15, 1959, the defendant, together with a juvenile, broke and entered the building of Mark's Auto Sales, a used car lot located at 2814 East Sprague Avenue, in Spokane, Washington, and took therefrom a television set, a radio and three rifles; now therefore.

It is Ordered that the Order of Probation entered in this cause on June 17, 1959, be and the same is hereby revoked and set aside, and that/judgment and sentence be imposed upon the defendant upon his plea of guilty heretofore entered.

Done in Open Court in the presence of the defendant, Jerry D. Mempa, on this 23rd day of October, 1959.

Louis F. Bunge, Judge.

Presented by: (Copy Illegible.)

[fol. 30] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SPOKANE

No. 16277

STATE OF WASHINGTON, Plaintiff, .

JERBY D. MEMPA, Defendant.

Transcript of Hearing on Revocation of Probation, October 23, 1959

Before: Hon. Louis F. Bunge, Judge.

APPEARANCES:

Mr. Howard A. Anderson, Deputy Prosecuting Attorney, Spokane County Courthouse Spokane, Washington. [fol. 31] The Court: What number of case do you have this filed in

Mr. Anderson: 16277, Your Honor. If Your Honor please, this is the time that has been set to have the matter of the State of Washington vs. Jerry D. Mempa, Superior Court No. 16277, brought before the Court on a motion for an order revoking the defendant's probation. The defendant, Jerry D. Mempa, is present in Court, Your Honor, and his stepfather, Mr. Dickerson, is also present in Court.

Your true and correct name is Jerry D. Mempa?

A. Yes.

Q. And how old are you now?

A. 17.

Q. Are you the same Jerry D. Mempa that was placed on probation by this Court after having entered a plea of guilty to the crime of joy-riding on June 17?

A. Yes.

Q. And at that time is it correct that you were placed on probation and as a condition of the probation you were required to be confined 30 days in the Spokane County Jail

A. Yes.

- Q. Now, Jerry Mempa, have you received notice of this particular hearing and a copy of the motion for an order [fol. 32] revoking your probation, which was served on you the 9th of October, '59?
 - A. Yes.
- Q. You understand the purpose of this motion before the Court?
 - A. Yes.
- Q. You realize that if the court revokes your probation that you could be sent to the Washington State Reformatory?
 - A. Yes.
- Q. And you wish to proceed with this matter before the Court at this time?
 - A. Yes.

The Court: Ask him if the statements in the affidavit are true, whether he was involved in the burglary that appears in the record.

Q. Jerry Mempa, you have read the affidavit, have you, attached to this motion?

A. Yes.

Q. And where it is stated that on the evening of September 15, 1959, that you were in the presence of a juvenile boy, David Grant; that the two of you went to Mark's Auto Sales, a used car lot located at 2814 East Sprague Avenue, and that this building was locked and no one was there; that you and the juvenile boy, David Grant, gained entry [fol. 33] into this building by breaking a side window and David Grant crawled through the window and opened the back door; that you then entered the back door; that after David Grant had failed to find any money in the building, that you and he took a television set, a radio, and three rifles from this building on this particular evening that I stated, on September 15, 1959; is that correct?

A. Yes.

Q. Is that true?

A. Yes.

The Court: Hand up the papers, please.

(Does so)

Mr. Anderson: I would state, Your Honor, to the Court,

Mr. William Weaver, the defendant's probation officer, is present in Court if the Court wishes to have testimony.

The Court: Oh, put him on and let him tell he is the one that made the report in this case.

Mr. Anderson: Yes, Your Honor.

WILLIAM D. WEAVER called as a witness, being first duly sworn according to law, was then examined upon his oath and testified as follows:

[fol.34] The Court: Just the facts in connection with the burglary.

Q. State your name, please.

A. William D. Weaver.

Q. What is your address, sir?

A. 1215 East 3rd, Spokane, Washington.

Q. What is your profession?

A. Parole and Probation Officer, State of Washington.

Q. As stated in the affidavit, have you had the supervision of the defendant before the Court, Jerry D. Mempa?

A. Yes.

The Court: Just make it short and sweet. You made the report in this connection and you state that the boy denied breaking into the place out there, wherever it was?

A. That is correct.

The Court: And he did so deny it?

A. Yes.

The Court: All right, that's all. Hand up the order revoking the probation. I'm signing the order revoking the probation that I previously granted you. Now, stand up, Jerry. Probation having been revoked, it is the further judgment of the Court that you be confined in the Washington State Reformatory for a maximum period of ten (10) years. The Parole Board will fix the time you stay there. [fol. 35] I'm going to recommend a year for you so you can—let me make a suggestion to you: We've had a lot of trouble with you, we've tried in every way in the world to stabilize you if we could and we don't seem to be able

to do it and I'm sorry that you weren't able to take advantage of the probation that was previously granted to you, but this seems to be the only answer that I can find for you, and think it over while you are at Monroe and you ask the Warden there to help you to learn some kind of a job so you can take care of yourself and then don't get into more trouble because if you do you are going to spend the rest of your life in these institutions. Don't do that. On the face of things you appear to be a fine boy, and you are a clean looking boy at least, but you have been in to an awful lot of trouble and you have got to get right with yourself on that trouble. The one that takes you out to commit a burglary is yourself. You have got to answer, and you are the one that has been responsible. You may be seated.

Mr. Anderson, when you write the report in this connection, will you state the (S PW AO EU R/H EUF T) ((unable to decipher)) to the Warden at the Reformatory?

Mr. Anderson: Yes, Your Honor.

The Court: And state the effort that we made to have [fol. 36] him committed as a psychopathic delinquent. State the (TK EU/OPB/TPHEPBT) ((unable to decipher)) phase of it that is presented and tell him that it is very important that this boy learn some kind of a trade there so that when he goes out into the world that he may be able to take care of himself and his extreme youthfulness is a fact and is important. Will you do that, please?

Mr. Anderson: Yes, Your Honor, I certainly will.

The Court: You filed your motion for revocation in the wrong file. Will you check on it to see which is right.

Mr. Anderson: Yes, Your Honor.

The Court: You had originally the psychopatic file—that the papers are in this correct file at least.

Mr. Anderson: Yes, Your Honor.

[fol. 37] STATE OF WASHINGTON, COUNTY OF SPOKANE, SS:

I, WAYNE C. LENHART, a Notary Public and Official Court Reporter, sitting in Department #4 of the Superior Courts for Spokane County,

Do Hereby Certify:

That I was called upon to type up the notes of Harry Malcom, now deceased, the then Court Reporter for Judge Bunge, also now deceased, by Deputy Prosecuting Attorney Richard Schroeder in November, 1965; the notes having been taken at a Revocation of Probation Hearing on October 23, 1959, before the Honorable Louis F. Bunge.

That I typed up these notes to the best of my ability, that there were portions I found impossible to read, that I checked these portions with Mrs. Ann Prideaux, also an Official Court Reporter for Spokane County, that together there are still portions neither of us can decipher, and that these portions are shown in the transcript as such. That the unreadable portions refer to the Prosecutor's Statement and that this statement is included for reference.

Witness my hand and seal this 26th day of November,

1965.

Wayne C. Lenhart, Notary Public in and for the State of Washington, residing at Spokane, Wash.

Certificate of Notary:

[fols. 38-40] ATTACHMENT TO HEARING OF OCTOBER 23, 1959

In the Superior Court of the State of Washington in and for the County of Spokane

No. 16277

STATE OF WASHINGTON, Plaintiff,

V.

JERRY D. MEMPA, Defendant.

Sentenced on October 23, 1959 by Judge Louis F. Bunge to serve not more than 10 years in the Washington State Reformatory, upon revocation on that date of the probation granted defendant on June 17, 1959 for a period of two years after his plea of guilty that date of the crime of violation of RCW 9.54.020, commonly known as "Joy-riding".

Minimum sentence recommended:

By Judge, one year.

By Prosecuting Attorney, two years.

Statement of Prosecuting Attorney

Background:

Jerry D. Mempa, a white male, was born in Butte, Montana on May 14, 1942. At the time of the offense he was 17 years of age. He and his younger brother were raised by his grandparents until 1952, at which time the boys commenced living with their mother and stepfather in Spokane. The mother and stepfather are presently residing at 2518 East Third. The stepfather, Mr. William Dickerson, is a barber. Mempa did not complete his eighth grade education.

Circumstances of the Case:

On the evening of April 24th this year, a juvenile boy, David Grant, and Jerry Mempa went to Al's Auto Sales, located at East 3108 Sprague Avenue in Spokane. They took a 1953 Chevrolet automobile without the permission of the owner. They were able to start the car by the use of a ring of automobile keys. Mempa states that Grant had the

ring of keys, and Grant states that Mempa was the one that had the ring of keys. This car was driven around Spokane, and later in the evening the two boys stopped this car in front of Charles Dickerson's home at East 1924 Hartson. The three juvenile boys then continued to drive the car around the Spokane area until it ran out of gas at 1911 East 6th. They then took the hub caps and fender skirts off the car and abandoned it at that point.

On the evening of April 25th, David Grant and Jerry Mempa took and drove a 1956 Chevrolet automobile without the permission of the owner. This car was taken from a private garage at South 308 Haven. The owners of the car were neighbors of David Grant. This car was driven around the Spokane area and then parked at Underhill Park. The following evening Mempa and Grant returned to the car and again drove it around the Spokane area. Mrs. Sampson, the owner of the 1956 automobile, reported the theft of her car to the police. She advised the police at that time that she thought David Grant had something to do with the theft of her car. David Grant was picked up and questioned, and at that time he related what had happened, and also advised the police of Mempa's and Dickerson's participation in the events that took place on April 24th, 25th and 26th. Jerry Mempa was picked up by the police on the evening of April 28th. On April 29th, Mempa was in the Spokane Juvenile Detention Home in the custody of Juvenile Officer Gene Davis; on that day Mempa escaped from custody. The Juvenile Court remanded this case on Mempa, accompanied by his stepfather, Mr. Dickerson, turned himself in to the Spokane County Sher-[fol. 41] iff's office on May 18, 1959. At that time Mempa admitted his participation in the theft of the two mentioned cars. His story as to what had occurred was substantially the same as David Grant's. On June 17, 1959, Jerry Mempa, represented by his attorney, Mr. Willard Roe, entered a plea of guilty to the charge commonly known as "Joy-riding". On that day the Court placed the defendant on probation for a term of two years, and as a condition of said probation, the defendant was required to serve 30 days in the Spokane County Jail.

Jerry Mempa continued living with his mother and stepfather at 2518 East Third, Spokane, Washington. On the

evening of September 15, 1959, Jerry Mempa, in the company of David Grant, went to Mark's Auto Sales, a used car lot located at 2814 East Sprague Avenue in Spokane, Washington. At that particular time the building on this property was locked. Jerry Mempa states that David Grant broke a side window out of the Mark's Auto Sales building, and that David then crawled through the window and opened the back door. Mempa states that he entered the building through the back door, and at that time David Grant attempted in vain to find some money in the building. The defendant and Grant, when leaving the building, took a television set, a radio, and three rifles. Mempa states that the agreement was that he would get all of the money that was found in the building, and that Grant would take whatever property he wanted from the building. Jerry Mempa) stated to the writer that the idea of breaking into this building came from David Grant.

Mempa further stated that subsequent to being placed on probation, he had attempted to find work and to hold a steady job, but had been unable to do so. On October 23, 1959, the defendant, Jerry Mempa, was taken before the Honorable Louis F. Bunge, Judge of the Spokane County Superior Court, on a motion to revoke the probation previously entered by the Court. At that time the defendant's stepfather, Mr. William Dickerson, was also present in court. The Court revoked the probation previously entered and entered a judgment sentencing the defendant to the Washington State Reformatory on the 23rd day of October. 1959. Judge Bunge specifically requested that the writer advise the Board of Prison Terms and Paroles that the defendant, during the time he is confined in the Reformatory, should be given every opportunity to learn a vocational trade. The Judge, after having heard the initial arraignment on the Joy-riding charge, was of the opinion that the greatest reason for Mempa's repeated violations of the law was because he is unable to obtain and hold a steady job.

Prior Record:

The defendant states that he has the following juvenile record: On December 19, 1955 the defendant was before the juvenile officers on a petition alleging burglary. He

was detained one week and placed on unofficial probation. On April 13, 1956 he was before the Juvenile Court on a petition alleging burglary and malicious vandalism. April 13th he was sent to the Green Hill Academy at Chehalis. Washington. On December 24, 1957 the defendant was released to his parents. On February 13, 1958, the defendant was found with wires in his possession which are commonly used for "hot-wiring" cars. He was placed in the Juvenile Detention Home. On that day the defendant and two other juveniles attempted an escape from the Home. A matron received quite serious injuries as a result of this attempted escape. Because of the possession of the wires and because of the attempted escape, the defendant was sent back to the State Training School at Chehalis. March 24, 1958, the defendant was involved in a riot at the Green Hill Academy and the authorities refused to keep him any longer. In March, 1958, the defendant was sent to Eastern State Hospital for observation as a possible psychopathic delinquent. He was then sent to the diagnostic center at Fort Worden, Washington. The staff there sent him to Western State Hospital. It was the opinion of [fol. 42] the doctors at Western State Hospital that the defendant was a psychopathic delinquent. The defendant was then returned to the Spokane County Juvenile Court. The Juvenile Court in Spokane County referred the defendant's case to the local Prosecutor's office for appropriate action on October 17, 1958. The defendant was again sent to Eastern State Hospital for observation on a petition as a possible psychopathic delinquent. The defendant at that time was represented by Mr. Paul Cooney and a formaldemand was made for a jury trial. After observing the defendant at Eastern State Hospital, the doctors concluded that he was not a psychopathic delinquent, and the petition was accordingly dismissed. The defendant was permitted to return to the custody of his parents.

Howard A. Anderson, Deputy Prosecuting Attorney

Approved:

Louis F. Bunge, Judge.

[fol. 43] ATTACHMENT TO RETURN AND ANSWER

In the Superior Court of the State of Washington in and for Spokane County

No. 16277

STATE OF WASHINGTON, Plaintiff,

VS.

JERRY D. MEMPA, Defendant.

JUDGMENT AND SENTENCE, (Plea of Guilty),

This matter having come on regularly for hearing in open court on the 17th day of June, 1959, the defendant, Jerry D. Mempa, being represented at said time by Willard Roe, his attorney appearing, and the State of Washington then appearing by Howard A. Anderson, Deputy Prosecuting Attorney for Spokane county, and the information charging the defendant with the crime of violating Section 9.54.020 of the Revised Code of Washington, commonly known as Joy-Riding, having been duly served upon and read to the Defendant, and the Court having ascertained the true name of the defendant, and having interrogated and informed him of the nature of the charge and that he might have one day's time in which to enter his plea, and having advised the Defendant that he was entitled to trial by jury. and to the services of an attorney and that the Court would appoint counsel for him at the expense of the county if he so desired and was without funds, and it appearing and the Court having been advised by the Defendant that he understood the nature of the charge and was ready and willing to enter his plea, and it appearing and the Court having determined that the Defendant is capable of and is exercising a free and rational choice, the Defendant was then arraigned and entered his plea of guilty to each crime charged in the Information. Whereupon, the defendant being asked if there were any causes that Judgment should not be pronounced and no sufficient cause being shown, and the Court and Defendant being fully advised in the premises.

It was on said June 17, 1959, Ordered, Adjudged and Decreed That said Defendant was guilty of the crime of Violating Section 9.54.020 of the Revised Code of Washington, commonly known as Joy-Riding, as charged in the Information herein, and it appearing said defendant was placed on probation for a period of two years on June 17, 1959, and that said probation was revoked on October 23, 1959; now, therefore, it is hereby Ordered, Adjudged and Decreed that he shall be punished by confinement in the Washington State Reformatory for a term of not more than 10 years, and to pay the costs of this prosecution taxed at \$ ——. The said sentence to run ——. said Defendant is now hereby committed to the custody of the sheriff of aforesaid county to be detained and by him delivered into the custody of the proper officers for transportation to, and confinement in, said institution.

Signed this 23rd day of October, 1959, in the presence of said Defendant.

Louis F. Bunge, Judge.

CERTIFICATE

Entered Jour. No. —. Page No. —. Department No. —, this — day of —, 19—.

I, ______, County Clerk and Clerk of the Superior Court of the State of Washington, in and for the County of _____, do hereby certify that the foregoing is a full, true and correct copy of the judgment, sentence, and commitment in this cause as the same appears of recordein my office.

Witness my hand and seal of said Superior Court this -- day of ---, 19-.

---, ---, County Clerk and Clerk of Superior Court.

[fol. 44] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, COUNTY OF SPOKANE

STATE OF WASHINGTON, Plaintiff,

VS.

JERRY D. MEMPA, Defendant.

In the matter of the estate of Deceased. No. 16277

CERTIFICATE

STATE OF WASHINGTON, County of Spokane, ss:

100

I, GEO. E. FALLQUIST, Clerk of the Superior Court of the State of Washington, for the County of Spokane, do hereby certify that the above and foregoing is a true and correct copy of the Information; Order of Probation; Notice; Order Revoking Probation; Judgment and Sentence (plea of Guilty) in the above entitled cause, as the same now appears on file and of record in my office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 4th day of October, 1965.

Geo. E. Fallquist, County Clerk. By (Copy Illegible), Deputy.

Certificate.

[fol. 45] ATTACHMENT TO RETURN AND ANSWER

WARRANT OF COMMITMENT

THE STATE OF WASHINGTON, County of Spokane, ss:

The State of Washington, To the sheriff of Spokane county and to the Superintendent and officers in charge of the Washington State Reformatory at Monroe, Washington. Whereas, Jerry D. Mempa, has been duly convicted in the Superior Court of the State of Washington, for said county, of the crime of Violating Section 9.54.029 of Revised Code of Washington, commonly known as "Joy-Riding", and judgment has been pronounced against him, and the Court having decreed that he be punished by not more than 10 years in the Washington State Reformatory, and pay the costs of this prosecution; all of which appears of record.

Now, this is to command you, The said sheriff, that you take and deliver the said defendant to the proper officers of said institution; and this is to command you, the superintendent and officers in charge of said institution, to receive the said defendant and to confine him at hard labor in said institution as provided by law for the aforesaid term and until such costs are paid, secured, or disposed of as by law provided, and these presents are your authority for the same, Herein Fail Not.

Witness the Honorable —, Judge of said Superior Court, and the seal thereof, this — day of October, 1959.

Geo. E. Fallquist, County Clerk and Clerk of the Superior Court. By —, —, Deputy Clerk.

In the Superior Court of the State of Washington
FOR THE COUNTY OF

THE STATE OF WASHINGTON,	Plaintiff,
vs. /	
—, —, Defendan	ıt.
Judgment and Sentence of Warrant	and Commitment
oTo—	
Filed in the office of the Clerk of 8 — day of —, 19—.	Superior Court thi
—, — Clerk. By	,, Deputy
Recorded.	Mary Control of the C
Vol. —. Page —.	

The foregoing instrument is a correct copy of the original as the same appears of record.

Attest October 6th, 1965.

George E. Fallquist, County Clerk and Clerk of the \Superior Court in and for the County of Spokane, State of Washington. By Harry Heingen, Deputy.

[fol. 46] ATTACHMENT TO RETURN AND ANSWER

AFFIDAVIT

STATE OF WASHINGTON, County of Spokane, ss.

RICHARD J. SCHROEDER, being first duly sworn, on oath deposes and says: That he is a Deputy Proescuting Attorney for the County of Spokane, State of Washington, residing at Spokane; that he investigated the circumstances surrounding the hearing had before the Honorable Louis F. Bunge, Judge of the Superior Court of Spokane County, Washington, on October 23, 1959, at which hearing Judge Bunge revoked the probation which he had previously granted to the defendant, Jerry D. Mempa, on June 17, 1959; that he determined that the court reporter who recorded the hearing was one Harry Malcolm, who has since died, and further located the notes of Mr. Malcolm and had them read to him by Mr. Wayne Lenhart, a reporter at the present time for the Superior Court of Spokane County: that the stenotype notes indicate that Mr. Mempa was not represented by counsel at the hearing and that the only people present were Mr. Howard Anderson, the Deputy Presecuting Attorney handling the case; Mr. William Weaver, the probation officer: and the defendant's stepfather, a Mr. Dickerson; that the notes further reflect that at no time during the hearing did the Court advise the defendant of any of his constitutional rights, including the right to have an attorney and be represented by counsel, and further there is no reference made to the fact that Mempa had been represented by counsel at the time that he pleaded guilty and was granted probation.

Richard J. Schroeder.

Subscribed and sworn to before me this 8th day of October, 1965.

Frances L. Lower, Notary Public in and for the State of Washington, residing at Spokane.

[fol. 47] THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 38470

[Title Omitted]

REPLY TO RESPONDENTS RETURN AND ANSWER

To: the Chief Justice of the above entitled Court.

Reply

Comes now, Jerry Douglas Mempa, Petitioner, hereby Denies each and every material allegation Respondent makes in Respondents Return and Answer except what Petitioner Admits to be true.

Conclusion And Prayer

Petitioner asks that petition be granted as prayed for.

AFFIDAVIT

STATE OF WASHINGTON,

County of Walla Walla, ss:

Comes now, Jerry Douglas Mempa, affiant herein, who first being sworn to oath, desposes and says; That he acknowledges the contents herein, is competent to bear witness to same; That this petition is offered in good faith, having merit as such, as fact; affiant is of legal age, being a citizen of the United States and of the State of Washington, wherein he resides.

Jerry Donglas Mempa, Petitioner Pro se.

Subscribed and sworn to before me this 12 day of Nov., 1965.

Raymond C. Banister, Notary Public, in and for the State of Washington, residing in the county of Walla Walla.

[SEAL]

[fol. 48] Affidavit of Service by First Class Mailing, Omitted in printing.

[fol. 49] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 38470 En Banc

IN THE MATTER OF AN APPLICATION FOR A WRIT OF HABEAS CORPUS OF JERRY DOUGLAS MEMPA, Petitioner,

B. J. Rhay, Superintendent, Washington Penitentiary, Respondent.

Opinion-Filed June 23, 1966

This matter involves a petition for a writ of habeas corpus. The salient facts are: Petitioner, Jerry D. Mempa, was charged in the Superior Court for Spokane County with "joy-riding," as defined and prohibited by RCW 9.54.020. At his arraignment in that court, the petitioner was represented by court-appointed counsel. Willard S. Roe, then a prominent member of the Spokane Bar, and now a judge of the Spokane County Superior Court. Mempa, with the advice of counsel, entered a plea of guilty to the charge of "joy-riding." He was granted the privilege of probation status, and the imposition of the sentence was [fol. 50] deferred pursuant to the provisions of RCW 9.95,200 and 9.95.210. Thereafter (approximately two months later), the Spokane County Prosecutor's Office moved to have Mempa's probation status revoked for violation of the terms and conditions under which it had been granted. At a hearing in the Spokane County Superior Court, the petitioner's probation was revoked. Sentence (the statutory maximum term of imprisonment of ten years, subject, of course, to subsequent parole board action determining the actual period of institutional confinement or custody) was then imposed and, promptly thereafter, judgment, sentence, and an order of commitment were entered accordingly.

The basis of this petition for a writ of habeas corpus may be concisely described as follows: Jerry D/Mempa was not represented by counsel at the peremptory hearing in

the Spokane Superior Court when (a) his probation status was revoked, (b) the deferral of sentence was vacated, and (c) its imposition took effective forthwith. Thus, the problem presented to us for decision is whether probationer Mempa was entitled to counsel as a matter of constitutional right in relation to any one or all of the foregoing aspects of administration of the state probation system.

[fol. 51] At this juncture some observations regarding the nature of probation-what it is and is not-may be helpful to an understanding of our decision herein denying Jerry D. Mempa's petition for a writ of habeas corpus. It should first be noted that probation is a very useful and flexible tool or technique of modern penal administration. In fact, few well-informed people would disagree respecting the desirability of the objectives of probation and its constructive potential as a modern penal device for the rehabilitation of criminal offenders. Probation permits special handling of carefully selected criminal offenders who have pleaded guilty, or have been convicted of committing an offense against society. Perhaps in one sense the significant characteristic of the probation device is that the person who is fortunate enough to qualify and to have been granted probation status is allowed to be at liberty in the community. However, the probationer's ostensible "liberty" is somewhat misleading in that he is actually under probation supervision. Thus, while the probationer is not confined to a penal institution, he remains in "semi-custody." The purpose or theory of such an arrangement is that probation status, with attendant supervision and its emphasis upon law-abiding, responsible conduct on the part of the probationer, can be most conducive to the rehabilitation of criminal offenders as useful members of society.

However, probation, or the acquisition of probation status, must be kept in proper perspective. It is not a

¹ Relative to a deferred sentence, RCW 9.95.220 provides:

If the judgment has not been pronounced, the court shall pronounce judgment after such revocation of probation and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory, in accordance with the sentence imposed.

matter of constitutional right. It is a matter of privilege [fol. 52] or grace, authorized by the state legislature to be granted or initially implemented solely through an exercise of judicial discretion by the Superior Court judges of the state. State ex rel. Schock v. Barnett, 42 Wn. 2d 929, 259 P. 2d 404 (1953).

Furthermore, the fact must not be overlooked that probationers, as a class, are criminal offenders, both in a legal and social or community sense. And, once again, it should be remembered that each such person who is afforded the privilege of probation status by a judge of the superior courts of this state has either (a) pleaded guilty, or (b) has been convicted of an offense prohibited by the criminal laws of the state of Washington. No inference is intended that, once having broken the law, such individuals are forever branded as criminals and forever afterward are to be treated as such. But the plain emotionally unvarnished facts are that probationers have broken the law. They have a criminal record; and as a result society has a substantial interest in guiding or conforming their future conduct-of not in terms of atonement or punishment, then clearly in terms of the possibility of their rehabilitation as productive members of society.

While those having probation status are accorded considerable freedom and liberty, their status and rights in this respect, and the matter of their liberty and freedom as well as limitations and termination thereof, are not to be placed in the same category with the quantum of rights the average law-abiding citizens possesses with respect to civil liberty and freedom. Stated another way, probation-[fol. 53] ers are not average, consistently deserving law-abiding citizens. They have exhibited in the past a tendency (at least in one instance) to engage in legally disapproved antisocial conduct.

Considering probationers as a class of criminal offenders, there is a close analogy between their status and the status of others who have pleaded guilty—or have been convicted—and have been committed to institutional custody, supervision and discipline rather than being granted probation. The administration and control of the activities and conduct of the latter group is of course performed by the prison authorities. It would seem farfetched to suggest

that the courts should invade this particular sphere of administrative prerogative and, by judicial fiat, exercise some sort of supervisory authority over existing prison administration, standards and practices.

In terms of further insight into the nature of probation and the administration of the probation system, similar reference and analogy could also be made to the functions of the State Board of Prison Terms and Paroles. The Board fixes the period of confinement and the terms and conditions of parole of those criminal offenders who have been committed to state institutional custody. In addition, the Board has the authority and the responsibility for administration of the state probation system. Judicial scrutiny, review, and control over the everyday matters of prison administration and/or parole administration is not only not feasible; it is inadvisable in the light of the particular expertise and training necessary to provide ef-[fol. 54] fective institutional custody and parole supervision. Judicial invasion of prison administration inevitably would be the most disruptive of prison programing, supervision, and discipline. The courts cannot and should not be expected to go into the prisons and decide which prisoners should be treated as "trustees." The point is obvious: prison officials must have effective control and authority in order to maintain an effective prison program. The same can be said of probation programing and administration.

Administrative and field probation officers, as well as prison officials, work diligently to establish workable programs for effective guidance of criminal offenders under their supervision and in their semicustody. Easy access to the courts by probationers to re-evaluate, or challenge, varied aspects of probation programing could well be disastrous in terms of the operation of the Washington state probation system. We are convinced that effective supervision of the probation vehicle by probation officers is a sensitive area, and one not particularly suited to detailed, over-all, or even general judicial supervision.

It may seem somewhat more appealing and persuasive to contemplate according full due process rights and privileges to probationers with respect to the termination of their liberty to be at large in their communities than would be the case with respect to the termination of the privileges of prison inmates. However, we are convinced that, while there are some differences in the status and the potential [fol. 55] for rehabilitation as between probationers, inmates, and parolees, the problems of administration and the objectives are basically similar in all three areas. To reiterate: there are no constitutional rights respecting the acquisition of probation status. Logically and rationally, there should be correlatively few, if any, constitutional rights and standards controlling the revocation of probation and matters of administration and supervision of those who have been granted that status.

The above outlined judicial views about the general nature of probation are re-enforced by the following language of RCW 9.95.220, which sets out certain legislative policy determinations made with respect to the operation of our probation system. This legislation provides as follows:

Whenever the state parole officer or other officer under whose supervision the probationer has been placed shall have reason to believe such probationer is violating the terms of his probation, or engaging in criminal practices, or is abandoned to improper associates, or living a vicious life, he shall cause the probationer to be brought before the court wherein the probation was granted. For this purpose any peace officer or state parole officer may rearrest any such person without warrant or other process. The court may thereupon in its discretion without notice revoke and terminate such probation. In the event the judgment has been pronounced by the court and the execution thereof suspended, the court may revoke such suspension, whereupon the judgment shall be full force and effect, and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory as the case may be. If the judgment has not been pronounced, the court shall pronounce judgment after such revocation of probation and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory, in accordance with the sentence imposed. (Italics ours.)

[fol. 56] It should be noted that the foregoing statute provides that any peace officer or state parole officer may rearrest a probationer without warrant or other process; furthermore, that the court may thereupon, in its discretion, without notice, revoke and terminate such probation. statute further provides that suspended or deferred sentences may be summarily revoked, sentence imposed, judgment rendered, and the defendant delivered to the sheriff for transfer to the state penitentiary. While it is true that the revocation of probation does occur in court, and the function is performed by a judge of the superior court, there is nothing in the statute enacted by the legislature to require the observance and application of due process standards as to this facet of the administration of the state probation system. We are not inclined, judicially, to impose, and to judicially assume responsibility for applying to probation those due process-standards which unquestionably are applicable and must be observed in the more orthodox aspects of criminal law administration.

State v. Shannon, 60 Wn. 2d 883, 889, 376 P. 2d 646 (1962), contains the following statement:

(f) Imposition of sentence, following revocation of probation, particularly in felony cases, is part of the criminal prosecution within the contemplation of Const. Art. 1, § 22 (amendment 10), at which time a defendant is entitled to be represented by counsel. In re Mc-Clinntock v. Rhay, 52 Wn. (2d) 615, 328 P. (2d) 369; In re Levi, 39 Cal. (2d) 41, 244 P. (2d) 403. (First italicized portion ours.)

The petitioner relies strongly on the foregoing views expressed in Shannon: But the basic doctrinal premise of [fol. 57] petitioner's argument seems to be that the principle applied in the landmark decision in Gideon v. Wainwright, 372 U.S. 335 (1963), should be applied, or extended and made to apply, in a probation context.

We will first discuss the above-quoted portion of the decision of this court in *State* v. *Shannon*, *supra*. The criminal offender therein initially pleaded guilty to grand larceny. His sentence was deferred, and probation granted. As in the instant matter, violations of the conditions of probation were reported. A revocation hearing was held

at which the defendant was not represented by counsel and offered no evidence to counter reported noncompliance with the conditions of probation. Probation was revoked, and sentence was imposed. The criminal offender was thereupon transferred from probation supervision and custody to prison supervision and custody. The former probationer who thus became an inmate of the state penitentiary filed a petition for a writ of habeas corpus in the Superior Court for Walla Walla County. The matter was remanded. to the Superior Court for Thurston County where the prisoner had been tried and convicted. That court vacated o the prior revocation of the criminal offender's probation and, furthermore, appointed counsel to advise and represent the petitioner at a hearing to be held on the question of whether or not probation status should be revoked and sentence imposed. The Superior Court for Thurston County. with the defendant and his court-appointed counsel present, reached the same result as at the previous probation revocation hearing when the probationer had not been represented by counsel. In other words, probation was revoked, [fol. 58] and, immediately thereafter, sentence was imposed by the court. The defendant in the Shannon case thereupon appealed.

In the Shannon opinion this court, as indicated hereinbefore, did, in fact, comment upon the right to counsel in a probation context; i.e., the right to counsel apropos of (a) the revocation of probation and (b) the imposition of sentence. The language of Shannon cited by the petitioner herein could admittedly be interpreted, and extended, to the effect that a probationer whose status has been revoked has the right to counsel in a due-process constitutional sense at the imposition of his suspended or deferred sentence following revocation of his probation. there was in fact no issue of the right to counsel explicitly. before this court in Shannon. The reason should be quite obvious. The probationer in Shannon was in fact represented by court-appointed counsel in the Thurston County Superior Court at the time of revocation of probation and the imposition of sentence. The issues specifically raised in Shannon are not issues herein.

State v. Shannon, supra, construed on the basis of the facts and the issues involved, and properly limited to the

decision therein, is not apt in terms of the facts in the instant application for habeas corpus by Jerry D. Mempa. Furthermore, the statements in Shannon as to an alleged right to counsel at a hearing concerning revocation of probation and at the time of subsequent imposition of sentence constituted dicta which, upon further consideration, the court is reluctant and unwilling to apply in the instant case as the law of this state.

[fol. 59] We also note in passing that In re McClintock v. Rhay, 52 Wn. 2d 615, 328 P. 2d 369 (1958)—cited in State v. Shannon, supra—did not involve revocation of probation and imposition of sentence. It is therefore distinguishable on this basis and provides no support for the claim of Mempa for a writ of habeas corpus in the instant case.

In this connection, we do not read State v. O'Neal, 147 Wash. 169, 265 Pac. 175 (1928), an early case involving a suspended sentence and a situation somewhat akin to the modern concept of probation, as being inharmonious with our reasoning in the instant case.

Insofar as State v. Shannon, supra, In re McClintock, supra, and State v. O'Neal, supra, may be inconsistent with the views expressed in this opinion, they are hereby overruled.

Our views as to the problem presented in the instant case may be summarized as follows: While probation is a modern innovation with much constructive potential in terms of the possible rehabilitation of criminal offenders, probation status, or the granting of it by the courts, is a matter of grace or privilege to be granted solely in the discretion of the courts. In the state of Washington the legislature has established a state probation system and and has provided for its functions, operations, and administration. The legislature has not prescribed that due process standards shall be observed and applied by the superior courts of Washington in the very limited, but admittedly significant, function performed in granting, denying, limiting and terminating probation status of [fol. 60] criminal offenders. We have previously held that there are no constitutional rights respecting the acquisition of probation status. And it is furthermore our reasoning that there are no constitutional rights involved in the termination or revocation of probationary status, or in respect to the concomitant operations of the superior courts involving imposition of either (1) suspended or (2) deferred sentences. The function involved, in terms of definitive action, is essentially quasi-administrative or plenary in nature. The operations are essentially no different from those performed administratively by the State Board of Prison Terms and Paroles or by the prison authorities in administering other phases of penal administration in the state of Washington.

A criminal defendant adequately represented by counsel, who, with counsel at his side, upon the entry of a plea of guilty or in a trial culminating in conviction accepts probation status, does so on the basis of the existing statutes. These clearly authorize termination of probation and imposition of sentence without notice and without reference to allegations of denial of constitutional rights, admittedly pertaining to more orthodox criminal proceedings in the trial courts of this state. In such a context it may even be said there has been a waiver of any right to claim denial of criminal due process procedure in a proceeding involving termination of probation status and the imposition of sentence.

Underlying petitioner Mempa's claim in the instant [fol. 61] case, there may have been, as indicated, some conjecture that the principles announced in the landmark Gideon case should apply or should be extended to proceedings involving revocation of probation and imposition of previously (a) suspended or (b) deferred criminal sentences. We are not constrained to read or apply Gideon in such a manner in the format or context of the administration of probation. Petitioner Mempa was adequately represented by counsel at the time he entered a plea of guilty and accepted the probation status. Thus, the petitioner was accorded full due process considerations at the appropriate time. He can make no valid claim of deprivation of an alleged constitutional right-at least not in a deferred sentence, probation, semicustody administrative context.

Nor can there be any valid contention that the decision of the United States Supreme Court in Escoe v. Verbst, 295 U.S. 490 (1935), is directly-controlling of the instant

matter. That decision involved a petition for a writ of habeas corpus by an inmate of a federal penitentiary whose probation had been revoked by a federal district judge on an ex parte showing without the probationer being brought before the court. The main thrust of the opinion is that such a procedure clearly contravened the intent of Congress as expressed in the language of the applicable federal probation statute—requiring that "such probationer shall forthwith be taken before the court." The Escoe opinion clearly negates the applicability of any specific constitutional safeguards and negatives the existence of constitutional safeguards and negatives the existence of constitutional following the revocation of federal probation. The abovementioned federal statutory requirements constituted the sole basis for granting the writ of habeas corpus.

Furthermore, Escoe v. Verbst, supra, did not involve any question of right to counsel—either at the probation hearing or at the imposition of sentence; and right to counsel at either stage of the proceedings is the only question raised by the petition in the instant case.

Thus, we do not regard the policy considerations and value judgments of the United States Supreme Court, as enunciated in Escoe v. Verbst, supra, to be controlling relative to our disposition of the instant matter. The appropriate federal statute required the presence of the probationer before the court during hearings concerning revocation of probation. The Washington statute likewise requires that "he shall cause the probationer to be brought before the court wherein the probation was granted." But there is no further statutory requirement as to presence of counsel, burden of proof, right to confront witnesses, et cetera.

In all fairness to a probationer—and consonant with regular and orderly court procedure—we would anticipate that probationers should and will be given an opportunity to present their side of the story to the court respecting reported violation of the terms or conditions of probation. But the scope of any such inquiry or hearing rests solely in the discretion of the superior court judges of the state [fol. 63] of Washington. No appeal, or a petition for a writ of habeas corpus, will be successful in this court where the question is whether the probationer was accorded his

constitutional due process rights at the hearing. He simply has none.

For the foregoing reasons, we find no merit in petitioner Mempa's allegations of denial of constitutional criminal due process procedural rights in the instant case. The application for habeas corpus should be denied. It is so ordered.

Finley, J.

We Concur: Rosellini, C. J., Hill, J., Ott, J., Hunter, J., Hale, J.

[fol. 64] Hamilton, J. (dissenting)—I dissent. The majority, in overruling those portions of State v. O'Neal, 147 Wash. 169, 265 Pac. 175 (1928), In re McClintock v. Rhay, 52 Wn.2d 615, 328 P.2d 369 (1958), and State v. Shannon, 60 Wn.2d 883, 376 P.2d 646 (1962), which inferentially or directly characterize imposition of criminal judgment and sentence as part of a criminal prosecution, have taken, in my view, an unwarranted, unjustified and unrealistic step backward in the administration of justice. They do this at a time and in an era when constitutional rights and due process concepts are receiving increasing and expanding attention and, by so doing, they open the door to and invite continued and increasing federal court disapproval and supervision of state court criminal procedures. We have gone through this in connection with search, arraignment, appointment of counsel, and confession procedures. Fortunately, in this state, we have been able to adapt to new concepts without undue inconvenience, principally because our procedures have been administered in the most part with befitting and uniform regard to fundamental fairness in the treatment of individuals before our criminal tribunals. When, however, we depart from fundamentally fair judicial processes, and cavalierly authorize discrimination in the right to counsel between one whose judgment and sentence is imposed immediately following conviction or plea of [fol. 65] guilty and one whose judgment and sentence may be imposed anywhere from a few months to several years later, we are inviting probation and revocation procedures which can well lead to questionable and potentially voidable institutional commitments/ Given no requirements for representation by counsel, it is inevitable that revocation procedures will vary from defendant to defendant, from county

to county, and from trial judge to trial judge. Such a situation may be acceptable in some administration contexts, but it can hardly be said to comport with the dignity of the judicial process or the traditional role of courts in criminal proceedings. Neither does it lend itself to the efficient administration of justice, for to short change an individual of any due process protections at the trial court level, when and where they can in the first instance he most effectively, efficiently and economically provided, is simply not good judicial policy. Disparity of standards among the courts in the search, confession and right to counsel cases has long since proven the unwisdom and inefficiency of such a course.

I have no quarrel with the majority's thesis that an errant individual who has been released from official custody by way of an order of deferred sentence remains, technically speaking, in "semi-custody" by virtue of probationary regulations. Neither do I differ with the theory that deferred sentences and probation are rehabilitative measures which descend upon the deserving miscreant "by the grace" [fol. 66] of the sentencing judge. But, I find little realistic support for the majority's denial of the right to counsel either at the time of hearing or of final judgment and sentence arising out of these fine phrases. It is one thing to say that there is no constitutional or due process right to the chancellor's "grace," but quite another thing to say there are no due process rights at such a critical stage of a criminal prosecution as the revocation of probation and the imposition of final judgment and sentence. The two simply do not go hand in hand.

It cannot be gainsaid that the recipient of the "grace" of an order of deferred sentence is the beneficiary of some very real and substantial advantages which do not flow to one who is sentenced to a custodial facility, or who is otherwise subjected to a final judgment and sentences. The individual with the order of deferred sentence in his hand is ordinarily permitted to return to his community, his family and his job, subject only to the behaviorial restrictions and conditions arising out of his probationary status. In a very realistic sense he is free, for his personal liberty is but slightly, restricted. And, of significant importance, he is accorded the right, after a successful probationary period,

of coming before the court and petitioning for a negation of his conviction and a dismissal of the charges. He may thus clear his record and remove outstanding penalties and disabilities. This latter privilege, even if unaccompanied by the other benefits, is a matter of considerable importance [fol. 67] in our society today. It is clearly distinguishable from a procedural right. It amounts to a substantial right which is afforded by legislative enactment. RCW 9.95.240. Fundamental fairness and the dignity of the judicial process dictate that this right, to say nothing of the sacred right of personal liberty, should not be subject to nullification by the whim of peremptory "quasi-administrative" proceedings which do not even afford the right to be represented by counsel at the time of entering the nullifying judgment and sentence.

This court has held in State v. Farmer, 39 Wn.2d 675, 237 P.2d 734 (1951), that the recipient of an order of deferred sentence is not entitled to an appeal from his conviction until entry of final judgment and sentence.1 Thus, the majority's view that due process concepts are fulfilled by affording counsel at the time of entry of the order deferring sentence, and that such concepts do not contemplate the right to counsel at any time thereafter to and including the time of entry of final judgment and sentence following a revocation proceeding is somewhat anomalous. In effect, the majority isolates this particular judgment and sentence from the context and concept of the ordinary criminal [fol. 68] criminal prosecution and says to the individual. you may now appeal for the first time in this prosecution; but, because you initially received a deferment of sentence. you are not now entitled to counsel to advise you of this right or to assist you in determining that a proper sentence is imposed. The reason for this legalistic tightrope walking is obscure to me, particularly when considered with the fact

Of course, it is understood that the right of appeal following a plea of guilty is very limited. However, the deferred sentence statute permits entry of such orders following either a plea of guilty or a verdict of guilty. Hence, the right to counsel at the time of revocation must be considered in the context of either form of conviction.

that the final judgment and sentence, whether entered with or without an intervening order of deferred sentence, bodes well to deprive an individual of his personal liberty and to forever nullify any opportunity of clearing his record of the conviction.

The majority seek sustenance for their position in the statute dealing with revocation of suspended or deferred sentences. They quote with emphasis RCW 9.95.220, which provides in part that the superior court may, in its discretion, without notice, revoke and terminate probation. It may be granted that the statute purports to dispense with formal notice as a prerequisite to revocation; however, I find little in the statutory language or in any reasonable concept of fundamental fairness that dispenses with the necessity for some type of hearing or the right to be represented by counsel. On the contrary, by providing that the probationer should be brought before the court, after rearrest for cause, i.e., violating his probation, it is fair to assume the legislature anticipated that a judicious judicial proceeding would ensue, during the course of which the fundamental [fol. 69] rights of society as well as those of the probationer would be respected. Certainly, the legislature did not intend that the courts should, at this stage of the prosecution, shed their traditional concern for fair play and due process concepts and assume a swashbuckling "quasi-administrative" attitude toward a defendant. At this point, it should be observed in passing that the legislature, in enacting standards for revocation of parole, provided that a parolee charged with a violation of his parole, short of conviction of another crime, would be entitled (a) to a fair and impartial hearing before the parole board, (b) to be represented by counsel at such hearing, and (c) to defend and present evidence on his own behalf. RCW 9.95.120. Thus, we have the incongruent situation of a convicted, incar-· cerated and paroled person possessed of more fundamental rights before an administrative board than this court is willing to afford to a probationer in a court of law.

Again, it seems to me, it is one thing to say that there is, no legislative, constitutional or due process requirement of formal notice of a projected probation revocation, but quite a different thing to say there is no legal requirement for

holding a hearing, assessing the reason for revocation, or affording counsel; if not at the hearing, at least at the time of entry of an appealable judgment and sentence.

The majority also appear to proceed upon the premise that once a person stands convicted of a crime and qualifies [fol. 70] for and partakes of the conditional liberty afforded by an order of deferred sentence; he is immediately shorn of constitutional safeguards which otherwise surround a criminal prosecution. In short, the majority cast such a trespasser into the role of a second class citizen, despite the fact that his past history suggests the probability of reformation and warrants the grace of probation. It may be conceded that such a person, by virtue of the criminal conviction, waives or forfeits the benefits of some constitutional rights, e.g., the right to further trial by jury. But, there seems to be little reason or justification to suppose that such a person waives or forfeits such basic and traditional safeguards as the right to be present at a judicial proceeding designed to revoke his probation, the right to be advised of the nature of the alleged probation violation, the right to present explanatory or mitigating evidence, or the right to be represented by counsel either at the hearing or at the time of imposition and entry of the appealable final judgment and sentence. While these rights as to probationers may not be fully spelled out in the federal and state constitutions, it would seem reasonable to conclude that they inhere in those documents, if in no other way than through the equal protection clause of the fourteenth amendment to the federal constitution. Certainly, there can be little doubt that the right to personal liberty is as valuable and sacred to one who has been convicted of a crime as to one who has not. I find nothing in our [fol. 71] constitutions that indicates a contrary belief. Neither can it be seriously questioned that the strength of our constitutional form of government lies in the protection afforded to the weak and unfortunate against injustice or arbitrary and capricious action. And, if this be so, it ill behooves us to sap this strength by isolating, with surgeon-like precision, various phases of a criminal prosecution for the purpose of parceling out, with Scrooge-like finesse, due process protections. Thus, it seems incompatible to say to a defendant that he is entitled to constitutional

safeguards in all the usual facets of a criminal prosecution, including the right to counsel at all stages of the proceeding, unless and until he is granted probation, whereupon due process concepts and society's interest in the preservation of fair standards of justice vanish in the mystical clouds of judicial grace. Instinctively one shrinks from this autocratic approach, for instinctively one feels that any person is entitled to be properly heard when a court of law undertakes to deprive that person of his personal liberty, conditional though that liberty might be.

The majority next point out that deferred sentences and probation are comparatively modern flexible, sensitive and potent innovations in the field of criminology. From this they then posit that courts should be slow to translate into constitutional terms the theory that the "privilege" of probation is a matter of "grace," and that revocation is a [fol. 72] matter of "discretion." The majority, however, distort the probation concept and attach too much significance to the above quoted words when they characterize the revocation procedure as a quasi-administrative function, and thus seek to carry it beyond constitutional dimensions and beyond the normal range of the judicial process.

The adjudication of criminal guilt and the meting out of statutory punishment is distinctively, traditionally and constitutionally a judicial function. It is no more an administrative function than granting, denying or modifying a divorce decree, and it does not partake of an administrative function simply because there are alternative solutions available in a given case. With but relatively few statutory exceptions, the administrative function in the field of penology basically begins and ends with the supervision of the convicted offender. Because both the judge and the administrator may be interested and concerned with reformation of the offender does not mean that their functions become indiscernably commingled, and, because a judge may accept, reject, or modify a recommendation of probation or revocation by an administrator does not mean that the judiciary is disruptively invading a peculiarly administrative province.

The bare and unvarnished truth is that the courts should and do stand as a bulwark between the individual and the possibility of mistaken, prejudiced, whimsical or arbitrary [fol. 73] administrative action. And, when the courts obeisantly hesitate to surround any facet of their proceedings and any individual involved therein with adequate, even though minimal, constitutional safeguards they are abdicating their responsibility.

The majority appear willing to concede that, while the granting of probation in the first instance is not a matter of right, a defendant is constitutionally entitled to be represented by counsel at that point. The stakes then are the defendant's liberty, his reputation and future record, and his appellate remedies. The state is represented by the prosecuting attorney. If the defendant receives a deferment of sentence and probation and subsequently stands before the same court accused by an administrative officer of a probation violation, the stakes are identical. The state is again represented by the prosecuting attorney and to some degree by the administrative officer. The defendant, however, now stands barren of a right to the assistance of counsel. I find no purpose, reason or fairness in this situation.

The fear that the presence of counsel would tend to convert such proceedings into protracted hearings is without merit and is nothing more than a red herring. If there is a valid factual issue as to the alleged probation violation, the defendant is not only entitled to a fair hearing. but as a matter of practical necessity he should have the assistance of counsel in evaluating his defense, assembling [fol. 74] his evidence, subpoening and interrogating his witnesses, and cross-examining opposing witnesses. average defendant is otherwise virtually helpless, and it is only in this way that the court can be fully, intelligently and efficiently advised. In the vast majority of cases, however, there is no dispute as to the probation violation. The only issue is the nature and extent of the punishment, a matter of vital concern to both the defendant and the court. Here again counsel, with his knowledge of court procedures. the defendant's background, and the alternative solutions available can be of inestimable assistance to the defendant and of substantially more help than hindrance to the court. At the very minimum, the presence of counsel would assure the court that the defendant was advised of his situation, and remove the lurking feeling of unfairness that surrounds sending an unrepresented person to a penal institution.

Likewise without merit is the fear that providing constitutional safeguards at the revocation stage would weaken the rehabilitative purposes of probation. Retribution, however swift, should always be accompanied by fundamental fairness, particularly when administered by and through a court of law. In fairness to any probationer, the procedures utilized should be designed to avoid the possibility, however remote, of revocations founded on accusations arising out of mistake, prejudice and caprice. The threat of arbitrary or whimiscal commitment does not tend to [fol. 75] encourage either cooperation or successful rehabilitation. Reformation can best be accomplished by fair, consistent, and straightforward treatment of the individual. No doubt it was this thought, in part at least, which prompted the drafters of the Model Penal Code for The American Law Institute to provide, in Tent. Drafts Nos. 2 (1954) and 4 (1955), § 301.4, as follows:

The Court shall not revoke a suspension or probation or increase the requirements imposed thereby on the defendant except after a hearing upon written notice to the defendant of the grounds on which such action is proposed. The defendant shall have the right to hear and controvert the evidence against him, to offer evidence in his defense and to be represented by counsel.

Finally, and perhaps fatally, the denial of counsel to a defendant at the revocation stage of probation could well raise serious constitutional questions of discrimination between affluent and indigent probationers. As the majority opinion inferentially points out, in all instances a probationer appearing before the superior court in a revocation proceeding will ordinarily be given an opportunity to be heard. As a practical and realistic matter, those probationers who can afford counsel will be accorded the opportunity of having counsel at their side throughout the proceeding. It would, indeed, be the rare superior court judge who would deny them such a privilege. Yet the majority would deny this right to indigents, thereby projecting discrimination between probationers who can afford counsel and those who cannot. Due process and equal [fol. 76] protection prohibit the accident of economic ability from being a criterion for right to counsel. See Douglas v.

California, 372 U.S. 353, 9 L. Ed. 2d 811, 83 Sup. Ct. 814 (1963); Griffin v. Illinois, 351 U.S. 12, 100 L. Ed. 891, 76 Sup.

Ct. 585 (1956).

Turning then from the general to the specific, the majority opinion, as it relates to petitioner, in effect concludes that petitioner by accepting a deferred sentence knowledgeably waived any and all rights to due process of law at the time of any subsequent revocation proceeding. Aside from the fact that it is extremely doubtful that any such theory of waiver was fully explained to petitioner at the time of the entry of the order of deferred sentence, the harshness and rigidity of the position taken by the majority is but emphasized by the facts appearing in this case, It is conceded. by the attorney general, and supported by the record, that at the time of the offense, the arraignment proceedings and the revocation, all in 1959, petitioner was but 17 years of The record further indicates that petitioner had not completed the eighth grade, and that since 1956 he had progressed through a variety of state institutions including Green Hill Academy, Eastern State Hospital, the Diagnostic Center at Fort Warden, Western State Hospital, and again Eastern State Hospital with a conflict of opinion between the latter two facilities as to whether he was a psychopathic delinquent. His migrations through these various institutions were under the aegis of the [fols. 77-79] juvenile court. His first appearance in superior court arose out of the offense for which he is presently in custody.

Against this background, even the attorney general expresses some doubt as to petitioner's ability to fully comprehend the nature of his situation at the time of the revocation hearing. And, under the circumstances, it would be somewhat of a strain, to say the least, to assume that he fully appreciated all ramifications of the order of deferred sentence and at the time of entry of that order knowingly, intelligently and competently waived all constitutional rights with respect to subsequent proceedings. Johnson v. Verbst, 304 U.S. 458, 82 L. Ed. 1461, 58 Sup. Ct.

1019, 146 A.L.R. 357 (1938).

In summary and in conclusion, I would

(1) Reaffirm the right to counsel at the time of imposition of sentence as established in the O'Neal, McClintock and Shannon cases, supra;

(2) Prospectively overrule that portion of In re Jaime v. Rhay, 59 Wn.2d 58, 365 P.2d 772 (1961), which holds that a probationer is not entitled to counsel at the revocation hearing, and afferd such right at all future revocation hearings; and

(3) Grant the writ of habeas corpus and remand petitioner to the sentencing court for rehearing and resentenc-

ing with counsel present.

Hamilton, J.

We concur in the result of this dissenting opinion.

Donworth, J., Weaver, J.

[fol. 80] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 81] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 39048

[Title omitted]

ORDER OF CONTINUANCE—October 20, 1966

The petition of Jerry Douglas Mempa for a writ of habeas corpus having come on regularly for hearing before Department I of this Court on October 7, 1966 the petitioner being represented by Carl Maxey, and the respondent being represented by Lee D. Rickabaugh, Assistant Attorney General; and the Couft having read and considered the petition and the respondent's return and answer, and it appearing that the application for a writ of habeas corpus and the return and answer raise the following issue:

Whether or not the petitioner was properly transferred from juvenile status for trial under the provisions of the criminal code, and, if not, what relief should be granted

the petitioner.

It further appearing that the opinion in *Dillenburg* v. [fol. 82] *Maxwell*, 68 W.D. 2d 481, 413 Pac. 2d 940, controls a determination of this case, but that the opinion in the Dillenburg case is not yet final, a petition for rehearing having been argued before the En Banc Court on September 27, 1966, and not yet determined Now, therefore, it is hereby

Ordered that the hearing in the above entitled proceeding is continued to a data to be determined after the final

disposition of Dillenburg v. Maxwell, supra; and

It is further ordered that both petitioner and respondent shall be afforded the opportunity to file amended briefs prior to the continued hearing and to present gral argument on the issue of the applicability of the final decision in *Dillenburg* v. *Maxwell*, *supra*, to the disposition of this proceeding.

Dated at Olympia, Washington, this 20th day of October, 1966.

/s/ Hugh J. Rosellini, Chief Justice.

[fol. 83] In the Supreme Court of the State of Washington

No. 39048

[Title omitted]

I, WILLIAM M. LOWRY, Clerk of the Supreme Court of the State of Washington, do hereby certify that the attached and foregoing is a full, true and correct copy of the Order of Continuance, filed October 21, 1966; Transcript of Proceedings, State vs. Mempa, filed September 27, 1966, and the whole thereof, as they now appear of record and on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 15th day of

November, 1966.

William M. Lowry, Clerk of the Supreme Court, State of Washington.

[fol. 84] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1966

No. 424

JERRY DOUGLAS MEMPA, Petitioner,

V

B. J. RHAY, Superintendent, Washington State Penitentiary

ORDER ALLOWING CERTIORARI—February 13, 1967

The petition herein for a writ of certiorari to the Supreme Court of the State of Washington is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

TRANSCRIPT

OF

RECORD

TRANSCRIPT OF RECORD

Supreme Court of the United States october Term, 19667

No. 734 22

WILLIAM EARL WALKLING, PETITIONER

2)8

B. J. RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF WASHINGTON

PETITION FOR CERTIORARI FILED OCTOBER 21, 1966 CERTIORARI GRANTED FEBRUARY 13, 1967

Supreme Court of the United States

OCTOBER TERM, 1966

No. 734

WILLIAM EARL WALKLING, PETITIONER

vs.

B. J. RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 39002

FOR THE MATTER OF THE APPLICATION FOR A WRIT OF HABEAS CORPUS OF WILLIAM EARL WALKLING, PETITIONER

B. J. RHAY, as Superintendent of the State Penitentiary, RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS—Sworn to May 26, 1966

To the Chief Justice of the Supreme Court of the State of Washington:

WILLIAM EARL WALKLING respectfully alleges as follows:

1

He is the petitioner herein. This is an original application.

п

Petitioner is and has been confined in the State Penitentiary at Walla Walla, Washington, under a sentence of five years imprisonment for violation of probation granted on a conviction of second degree burglary.

III

Petitioner is illegally confined in the aforementioned because his rights guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States and rights guaranteed by the Constitution of the State of Washington have been violated.

IV

Petitioner was arrested on February 24, 1964 while on probation, from a conviction of second degree burglary. He was accused of forging several checks on February 2, 1963. Two days later, February 26, in an appearance be-

fore Judge D. J. Cunningham he was informed of his right to counsel on the forgery charge. Before further proceedings were had, petitioner was transferred to Olympia for a hearing on charges that he had violated his [fol. 2] probation. On May 18, 1964 a revocation hearing was held, and as a result petitioner was sentenced to a minimum of five years in prison. Petitioner's request for assistance of counsel at the hearing was denied and the hearing proceeded without counsel representing petitioner.

V

Petitioner's constitutional rights were violated at the

hearing in the following manner.

Petitioner was denied his right to the assistance of counsel in a hearing which resulted in his being imprisoned. At no time did he waive the assistance of counsel. On the contrary he specifically requested such assistance on several occasions.

VI

A defendant charged with such activities as will result in a revocation of probation and the imposition of a prison sentence, is entitled to have the court appoint counsel to protect the petitioner's rights, and a failure to do so denies him due process of law in violation of the Washington State Constitution and the United States Constitution.

VII

WHEREFORE, petitioner prays that a Writ of Habeas Corpus may issue, directed to B. J. Rhay, commanding him that he have the bond of the petitioner, by him imprisoned and detailed, together with the time and cause of punishment and detention, before said Court, to do and receive what shall then and there be considered concerning said petitioner in pursuance of the law in such case made and provided.

/s/ Edmund J. Wood
Of Coney & Collier
--Attorneys for Petitioner

Of Counsel:

/s/ Michael H. Rosen
MICHAEL H. ROSEN
American Civil Eiberties Union
of Washington

[fol. 3]

STATE OF WASHINGTON) is.

WILLIAM EARL WALKLING, being first duly sworn on oath deposes and says: That he is the petitioner named in the above and foregoing petition; that he has read the same, knows the contents thereof, and believes the same to be true.

/s/ William Earl Walkling

SUBSCRIBED AND SWORN to before me this 26 day of May, 1966.

/s/ P. M. O'Brien NOTARY PUBLIC in and for the State of Washington, residing at Walla Walla. [fol. 4]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 39002

[File Endorsement Omitted]

To the Clerk:

The petition to proceed in forma pauperis is denied Done June 21, 1966.

/s/ Hugh J. Rosellini Chief Justice

IN THE MATTER OF THE APPLICATION FOR A WRIT OF HABEAS CORPUS OF WILLIAM E. WALKLING, PETITIONER

B. J. RHAY, as Superintendent of the State Penitentiary, RESPONDENT

MOTION FOR LEAVE TO PROCEED FORMA PAUPERIS—filed June 24, 1966

Comes now William E. Walkling, the above-named petitioner, and moves the court for an order granting him leave to file a Petition for a Writ of Habeas Corpus forma pauperis. The motion is based on the affidavit below.

Dated this 27 day of May, 1966.

/s/ William E. Walkling

AFFIDAVIT

STATE OF WASHINGTON

SS.

COUNTY OF WALLA WALLA

Comes now William E. Walkling and first being duly sworn, on oath, states:

That he is the petitioner in the attached Petition for a Writ of Habeas Corpus which, by this reference, is made a part hereof as if fully set out herein.

II.

That he is entitled to prosecute said writ because of his illegal confinement contrary to the Constitution of the State of Washington and of the United States.

III.

That by reason of poverty he is unable to pay the costs for such proceeding or give security therefor.

[fol. 5] WHEREFORE, the petitioner prays that the Court enter an order allowing him to proceed in this matter forma pauperis.

/s/ William E. Walkling

SUBSCRIBED AND SWORN to before me this 26 day of May, 1966.

/s/ P. M. O'Brien
Notary Public in and for the State
of Washington, residing at Walla
Walla

[fol. 6]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 39002

[File Endorsement Omitted]

[Title Omitted]

RETURN AND ANSWER-filed August 15, 1966

Comes now the respondent, B. J. RHAY, Superintendent of the Washington State Penitentiary, by and through his attorneys, JOHN J. O'CONNELL, Attorney General and STEPHEN C. WAY, Assistant Attorney General, and for return to the application for a writ of habeas corpus of WILLIAM EARL WALKLING, alleges:

I

That the respondent, B. J. RHAY, is the duly appointed, qualified and acting Superintendent of the Washington State Penitentiary at Walla Walla, Washington, a state institution for the care, confinement and rehabilitation of convicted felons sentenced and committed to a term of confinement by the superior courts of the state of Washington.

[fol. 7]

That the respondent, B. J. RHAY, has in his custody and in confinement in the Washington State Penitentiary, the petitioner, WILLIAM EARL WALKLING, pursuant to and in accordance with an order revoking deferral and imposing sentence rendered by the Superior Court of the State of Washington for Thurston County in Cause No. C-2941 approved by the court on May 18, 1964; wherein it appears that the petitioner had previously been convicted of the crime of BURGLARY IN THE SECOND DEGREE upon his plea of Guilty and sentence was deferred and the petitioner granted probation on October 29, 1962, which deferral of sentence and probation was

revoked by the court on May 18, 1964 and the petitioner, WILLIAM EARL WALKLING sentenced to a term of confinement of not more than fifteen years. A true copy of said order revoking deferral and imposing sentence is attached hereto and by this reference incorporated herein as though fully set forth.

FURTHER AND FOR ANSWER the respondent denies each and every material allegation and thing contained in the application of WILLIAM EARL WALK-LING for a writ of habeas corpus except such allegations therein as may hereinafter be affirmatively admitted in the respondent's:

AFFIRMATIVE ANSWER AND DEFENSE

I

That on or about October 11, 1962, the petitioner, WILLIAM EARL WALKLING was charged by Information filed in the Superior Court of the State of Washington for Thurston County in Cause No. C-2941 with having committed on or about September 19, 1962, the crime of BURGLARY IN THE SECOND DEGREE. A true copy of such information is attached hereto and by [fol. 8] this reference incorporated herein as though fully set forth.

II

That on October 29, 1962, the petitioner, WILLIAM EARL WALKLING was brought before the Superior Court for Thurston County for arraignment upon the charges as contained in the Information at which time he was accompained by his attorney, W. N. Beal, at which time the petitioner was fully advised of his rights in the premises and the petitioner, having advised the court that he understood the nature of the charge and was willing and ready to enter his plea, entered a plea of Guilty to the crime as charged in the Information; thereafter, the Court entered its order deferring the imposition of sentence for a period of three years from October 29, 1962 granted the petitioner probation under the supervision of the Board of Prison Terms and Paroles, and, as a fur-

ther condition of such deferral of sentence, required the petitioner to serve ninety days in the Thurston County jail and pay his proportionate share of restitution for the crimes in which he was involved. A true copy of such order rendered on the 17th day of December 1962 is attached hereto and by this reference incorporated herein as though fully set forth.

ΠÎ

That on May 2, 1963, a bench warrant was ordered by the Superior Court for Thurston County to be issued for the apprehension of the petitioner WILLIAM EARL · WALKLING, on the basis of the probation officer's report that the petitioner had violated the terms of his probation. That thereafter and up until February 24, 1964, the whereabouts of the petitioner were unknown until on said date the petitioner was arrested by the Sheriff of Lewis [fol. 9] County, and thereafter an Information was filed in the Superior Court for Lewis County charging the petitioner with fourteen counts of FORGERY IN THE FIRST DEGREE and fourteen counts of GRAND LARCENY. On April 16, 1964, the petitioner was transported from the Lewis County jail to Thurston County jail pursuant to the bench warrant issued by the Superior Court. That on May 12, 1964, the petitioner, WILLIAM EARL WALKLING, was brought before the Superior Court for Thurston County for hearing on the petition of the prosecuting attorney for an order revoking the order deferring sentence and granting the petitioner probation at which time the petitioner requested that the matter be continued in order that the petitioner be afforded the opportunity to secure the services of an attorney and the matter was then continued to May 18, 1964 at 9:00 o'clock a.m. for further hearing. On May 18, 1964, at 9:00 o'clock a.m., the matter was again called for hearing at which time the petitioner was present in court without an attorney but the petitioner advised the court that Smith Troy, an Attorney at Law was supposed to represent him. The court then held the matter in abeyance until 9:15 a.m. of that day and the matter was again called and the defendant appeared without counsel and

the court proceeded to hear the testimony in support of the petition for revocation of the deferral of sentence and probation and, thereafter, concluded that the order granting deferral of sentence and probation should be revoked, whereupon the petitioner was, at that time, sentenced to a term of confinement of not more than fifteen years.

IV

That the hearing before the Superior Court for Thurston County, upon the petition for the revocation of the [fol. 10] deferral of sentence and probation in the petitioner's case was not a "criminal prosecution" as those terms are used in Art I, § 22 as amended by the 10th Amendment to the Constitution of the State of Washington, nor a "criminal case" as those terms are used in the Sixth Amendment to the Constitution of the United States, nor do "due process limitations" apply to such hearings. Mempa v. Rhay, 68 W.D.2d, 871; Jaime v. Rhay, 59 Wn.2d 58, 365 P.2d 772.

WHEREFORE, the respondent having made its return and fully answered the application for a writ of habeas corpus of WILLIAM EARL WALKLING, prays that the same be denied and the proceedings dismissed.

JOHN J. O'CONNELL Attorney General

/s/ Stephen C. Way
STEPHEN C. WAY
Assistant Attorney General

STATE OF WASHINGTON

0 8

Thurston County

STEPHEN C. WAY, being first duly sworn on oath deposes and says:

That he is an Assistant Attorney General of the State of Washington and one of the attorneys for respondent herein; that he has read the foregoing return, knows the contents thereof, and believes the same to be true.

/s/ Stephen C. Way STEPHEN C. WAY

Subscribed and sworn to before me this 12th day of August 1966.

"/s/ Paul J. Murphey
NOTARY PUBLIC in and for the
State of Washington, residing at
Olympia.

[fol. 11]

ATTACHMENT TO RETURN AND ANSWER

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

No. C-2941

STATE OF WASHINGTON, PLAINTIFF

VS

JAMES ORIN REID and WILLIAM EARL WALKLING,
DEFENDENTS

INFORMATION—sworn to October 11, 1962

Comes now Harold R. Koch, Deputy Prosecuting Attorney in and for Thurston County, State of Washington, and informs the Court that in said county and state, on or about the 19th day of September, 1962, the defendants above-named, JAMES ORIN REID and WILLIAM EARL WALKLING, did commit the crime of BURGLARY IN THE SECOND DEGREE, set out as follows, to-wit:

They, the said JAMES ORIN REID and WILLIAM EARL WALKLING, defendants, in the County of Thurston, State of Washington, on or about the 19th day of September, 1962, with intent to commit a crime therein, willfully, unlawfully and feloniously did break and enter the home of one Vern Johnson, situated in Thurston County, State of Washington, the same being a building wherein property was then and there kept for sale, use or deposit.

All of which is contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Washington

dignity of the State of Washington.

/s/ HAROLD R. KOCH Deputy Prosecuting Attorney

STATE OF WASHINGTON

COUNTY OF THURSTON

HAROLD R. KOCH, being first duly sworn, on oath deposes and says: That he is the Deputy Prosecuting Attorney in and for Thurston County, State of Washington; that he has read the foregoing Information, knows the contents thereof and believes the same to be true.

/s/ HAROLD R. KOCH

SUBSCRIBED & SWORN TO before me this 11th day of October, 1962.

Deputy Clerk of the Superior Court

[fol. 12]

ATTACHMENT TO RETURN AND ANSWER

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

No. C-2941

STATE OF WASHINGTON, PLAINTIFF

VS

JAMES ORIN REID and WILLIAM EARL WALKLING,
DEFENDENTS

ORDER—December 17, 1962

This matter having come on regularly for hearing in open Court on the 29th day of October, 1962, the State of Washington appearing and being represented by Harold R. Koch, Deputy Prosecuting Attorney in and for Thurston County, State of Washington, the defendant, WILLIAM EARL WALKLING, being present in Court and being represented by his attorney, W. N. Beal, and the defendant being advised that a criminal charge had been filed charging him with the crime of BURGLARY IN THE SECOND DEGREE, and the Court having ascertained the true name of the defendant, and advising him that he might have additional time, not less than a day, as may be reasonably necessary, in which to enter his plea, and having advised the defendant that he was entitled to a trial by jury and said defendant, WILLIAM EARL WALKLING, having stated that he wished to proceed, and the Information having been read to the defendant and a certified copy thereof having been served upon him in open Court, and the Court having been advised by the defendant that he understood the nature of the charge and was willing and ready to enter his plea, and it appearing, and the Court having determined that the defendant is capable of and is exercising a free and rational choice, the defendant was then arraigned, and entered his plea of guilty to the crime as charged in the Information. Whereupon, the Court having heard the statement of the defendant and his attorney and of the Deputy Prosecuting Attorney, and the defendant being

asked whether there were any causes why judgment should not be pronounced and no sufficient cause being shown, and the Court and the defendant being fully advised in the premises, it is hereby

[fel. 13] ORDERED, ADJUDGED AND DECREED that the defendant, WILLIAM EARL WALKIANG, be, and he is hereby guilty as charged. It is further

ORDERED, ADJUDGED AND DECREED that sentence be, and it is hereby deferred for a period of three (3) years from the aforementioned date of October 29, 1962, at which time the defendant shall appear before the Court and show cause why sentence should not be passed against him. It is further

ORDERED, ADJUDGED AND DECREED that as conditions of said deferral of sentence, the defendant, WILLIAM EARL WALKLING, shall maintain general good behavior and make monthly reports to the Board of Prison Terms and Paroles of the State of Washington and abide by their rules and regulations. It is further

ORDERED, ADJUDGED AND DECREED that as a further condition of said deferral of sentence, the defendant is to serve ninety (90) days in the Thurston County Jail at Olympia, Washington, with credit for time served. It is further

ORDERED, ADJUDGED AND DECREED that said defendant, WILLIAM EARL WALKLING, shall pay his proportionate share of restitution for all other crimes in which he was involved; and, further, that he shall pay the costs of his prosecution herein.

DATED this 17th day of December, 1962.

/s/ RAYMOND W. CLIFFORD Judge

PRESENTED BY:

/s/ HAROLD R. KOCH
Deputy Prosecuting Attorney

APPROVED:

/s/ W. N. BEAL Attorney for Defendant [fol. 14]

ATTACHMENT TO RETURN AND ANSWER IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

No. C-2941

STATE OF WASHINGTON, PLAINTIFF vs

JAMES ORIN REID and WILLIAM EARL WALKLING, DEFENDENTS

ORDER REVOKING DEFERRAL AND IMPOSING SENTENCE—May 18, 1964

This matter having come on for hearing on the petition of Harold R. Koch, Deputy Prosecuting Attorney in and for Thurston County, State of Washington, for an order revoking the order deferring sentence herein as to WIL-LIAM EARL WALKLING, which order was granted October 29, 1963. The Court took notice that this matter had been previously before the Court for revocation of the deferral of sentence on May 12, 1964, at which time the defendant, WILLIAM EARL WALKLING, was present in court without an attorney. The Court ascertained from the defendant that he desired additional time to secure an attorney and the Court then and there continued the matter to May 18, 1964, at 9 o'clock A.M. for further hearing. The case was called at 9 o'clock A.M. on May. 18, 1964, the defendant, WILLIAM EARL WALKLING, being present in court and still not having an attorney, but was advised by the defendant that Smith Troy was supposed to represent him. The Court waited until 9:15 A.M. and proceeded. The defendant appeared in these proceedings without counsel; the Petition to Set Aside Deferral of Sentence was read to the defendant in open court and a certified copy thereof was served upon him in open court. Clare Murray, the district probation and parole officer, was sworn and testified in regard to the

fourteen separate counts of forgery and the fourteen separate counts of grand larceny filed against this defendant subsequent to October 29, 1962, for criminal acts occurring subsequent to October 29, 1962; the Court having determined that the facts as set out in said petition are true, and having satisfied itself that the deferment [fol. 15], of sentence hereinhefore granted October 29, 1962, ought to be revoked and sentence imposed as provided by law; the Court being duly advised in the premises, it is hereby

ORDERED, ADJUDGED AND DECREED that the deferral of sentence heretofore granted upon defendant's plea of guilty to the crime of BURGLARY IN THE SEC-OND DEGREE in said order granted October 29, 1962, be, and the same is hereby revoked and set aside. It is further

ORDERED, ADJUDGED AND DECREED that upon defendant's plea of guilty, he is hereby adjudged to be guilty of the crime of BURGLARY IN THE SECOND DEGREE as charged in the Information herein and, as punishment therefor, the said WILLIAM EARL WALK-LING be, and he is hereby sentenced to fifteen (15) years at hard labor in the State Reformatory at Monroe, Washington, and to pay the costs of prosecution herein.

SIGNED in the presence of the defendant, WILLIAM EARL WALKLING, this 18th day of May, 1964.

/s/ RAYMOND W. CLIFFORD
Judge

[fol. 16]

No. 39002

[Affidavit of Service By Mailing Omitted in Printing]

[fol. 17]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 39002

[Title Omitted]

AFFIDAVIT OF HAROLD R. KOCH—Sworn to September 7, 1966

STATE OF WASHINGTON)
COUNTY OF THURSTON)

HAROLD R. KOCH, being first duly sworn, on oath deposes and says: I am the Prosecuting Attorney in and for Thurston County, State of Washington. On May 18, 1964, I was Deputy Prosecuting Attorney in and for Thurston County, State of Washington, and I appeared on behalf of the State of Washington in the Thurston County Superior Court Cause entitled State vs. James. Orin Reid and William Earl Walkling, under Cause No. C-2941. The case was called at 9:00 A.M. on May 18, 1964, on my petition for an order revoking the order deferring sentence as to William Earl Walking which had been granted on October 29, 1962.

The matter had previously been before the Court for revocation of the deferral of sentence on May 12, 1964, at which time Earl William Walkling was present in Court without an attorney. The case had been continued until May 18 because the defendant desired additional

time to secure an attorney.

When the hearing again convened on May 18, the de-[fol. 18] fendant advised the Court that an Olympia attorney named Smith Troy was supposed to represent him. The matter was adjourned for fifteen minutes, and then proceeded with the defendant appearing without counsel.

I have no recollection of whether or not the defendant William Earl Walkling specifically requested the assistance of counsel or the appointment of counsel, and I have no recollection of what Judge Raymond W. Clifford might have said or not said if such a request was made. I also do not recall specifically whether or not Judge Clifford advised the defendant of a right to court appointed counsel.

I am of the opinion, however, that Judge Clifford did advise the defendant that he had a right to be represented by retained but not to court appointed counsel, and I am further of the opinion that had the defendant requested the court appointment of counsel his request would have been refused by Judge Clifford. Judge Clifford had a practice in all probation revocation proceedings of refusing to appoint counsel, and of informing those who requested counsel that there was not a right to court counsel in such hearings. The Judge did, however, permit the appearances of retained counsel for those who had them, and he was always willing to grant reasonable continuances for the benefit of retained counsel.

/s/ Harold R. Koch

Subscribed and sworn to before me this 7th day of September, 1966.

/s/ Anne E. Koch Notary Public in and for the State of Washington, residing at

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 39002

[File Endorsement Omitted]

In the Matter of the Application for Writ of Habeas Corpus of

WILLIAM EARL WALKLING, PETITIONER

vs.

B. J. RHAY, as Superintendent of the Washington State Penitentiary at Walla Walla, Washington, RESPONDENT

ORDER DENYING APPLICATION FOR WRIT OF .
HABEAS CORPUS—October 18, 1966

This matter came on regularly for hearing before Department No. I of this court on October 7, 1966, the petitioner, WILLIAM EARL WALKLING being represented by his attorney, EVAN L. SCHWAB, and the respondent being represented by STEPHEN C. WAY, Assistant Attorney General, and the court having read and considered the application of WILLIAM EARL WALKLING for a writ of habeas corpus, and the respondent's return and answer, and attachments thereto, and it appearing that the application for a writ of habeas corpus and the return and answer give rise to the following issue:

1. Whether or not the petitioner's constitutional rights were violated upon the grounds that the superior court of the state of Washington in and for the county of Thurston in Cause No. C-2941 prior to the hearing on the motion to revoke the petitioner's probation and impose sentence upon his conviction of the crime of Burglary in the Second Degree, did [fol. 20] not advise him of a right to be provided with an attorney to give aid and assistance to the petitioner to be provided for at public expense.

This court having considered the application for a writ of habeas corpus of WILLIAM EARL WALKLING, the return and answer of the respondent and the attachments thereto, the memorandum brief of the petitioner and the respondent, and having heard the oral argument by counsel for the petitioner, EVAN L. SCHWAB, and oral argument on behalf of respondent by STEPHEN C. WAY, Assistant Attorney General, and the court being fully advised in the premises, concludes:

1. The application of WILLIAM EARL WALKLING for writ of habeas corpus is controlled by this court's recent decision in Mempa v. Rhay, 68 W.D. 2d 871 and his constitutional rights were not violated on the grounds alleged for the reasons assigned in the decision by this court in Mempa v. Rhay, supra.

IT IS HEREBY ORDERED that the application of WILLIAM EARL WALKLING for a writ of habeas corpus be, and the same is hereby denied and the proceedings dismissed.

Done in the Chambers of the Chief Justice this 18th day of October 1966.

/s/ Hugh J. Rosellini Chief Justice

[fol. 21]

[Affidavit of Service By Mailing Omitted in Printing]

[fol. 22]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 23]

SUPREME COURT OF THE UNITED STATES No. 734, October Term, 1966

WILLIAM EARL WALKLING, PETITIONER

v.

B., J. RHAY, Superintendent, Washington State Penitentiary

ORDER ALLOWING CERTIORARI—February 13, 1967

The petition herein for a writ of certiorari to the Supreme Court of the State of Washington is granted. The case is placed on the summary calendar and set for oral argument immediately following No. 424.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

7 U. S. GOVERNMENT PRINTING OFFICE; 1967 24

JOHN' F. DAVIS, CLERK

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IN THE

STATES COURT OF THE UNITED SUPREME

1966

OCTOBER TERM, NO

JERRY DOUGLAS MEMPA,

vs.

Petitioner,

B. J. RHAY, Superintendent, Washington State Penitentiary,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE OF THE STATE OF WASHINGTON SUPREME COURT

Washington 98101 Evan L. Schwab 1405, 1411 Fourth Avenue Seattle,

Avenue on 98101/ Washington Donald A. Schmec... Schmechel

Union of Washington 2101 Smith Tower Seattle, Washington 98104 Liberties American.Civil Libe. Union of Washington 2101 Smith Tower Rosen Michael H.

ATTORNEYS FOR PETITIONER

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552, 18 U.S.C. § 3006A (b)				Stevens, The Defense of Indigarime in Washington - A Survey 1965) nce of Counsel, for Accused at as Requiring Vacation Thereof 20 A.L.R. 2d 1240 (1951)	Criminal Law Bulletin, Vol. I, No. 9, p. 34 (November 1965) GAO; B-156932, June 13, 1966, 34 Law Week 2717	Process, 46 Min 301.4 [Tent.	ects of Probation Revocation, 311 (1959)
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

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JERRY DOUGLAS MEMPA,

Petitioner,

VS.

B. J. RHAY, Superintendent, Washington State Penitentiary,

Respondent.

SUPREME COURT OF THE STATE OF WASHINGTON PETITION FOR A WRIT OF CERTIORARI

issue 1966. of Jerry Douglas Mempa prays that a Writ of Certiorari entered in the above-entitled case on June 23, to review the judgment of the Supreme Court of the State Washington

OPINION BELOW

is reported the Washington State Supreme Court, repro-(1966) duced in Appendix B hereto, infra, pp. B-1 to B-15; P.2d 2d (Advance Sheets) 871, The opinion of 68 Wash. Dec.

JURISDICTION

infra, p. B+1). In Washington, no separate 1966 invoked filed on June 23, 18 jurisdiction of this Court The opinion of the Court below was The Appendix B, is entered. 49; judgment

cover " refers to the record of the proceedings in the court below, is entitled "Transcript on Petition for Certiorari" on its co 1/ "T

the claimed under rights because States. 1257(3), United the U.S.C., of Constitution 28

QUESTIONS PRESENTED

- counsel ç t right revocation proceeding? ಗ the Fourteenth Amendment confer probation court state ಹ during
- counsel to a right court state Amendment confer d OF stage judgment Fourteenth and the at the sentencing Does proceeding?
- Of absence unable the and in defendant exists, be appointed for a counsel 4 right counsel 4 such ploy counsel? IF waiver, must 8

STATUTES INVOLVED CONSTITUTIONAL PROVISIONS AND

Sixth the are provisions involved constitutional The ment

the Assistance accused the right . . . to have defence," criminal for his the enjoy Counsel "In all shall enio of

of the Constitution Amendment 1 of the Fourteenth States, Section United and

ue process s juriswithout due within its any laws. or property, without d to any person within it protection of +h . liberty, or nor deny to the nor of life, law, diction

9 3006A 9.54.020 the of U.S.C. and 10.40.175 to sections A-1 18 552, infra, pp. are Stat. provisions involved 9.95.240 78 are reproduced in Appendix A, and 9.95.220, Code of Washington, statutory 9.95.210, 200, Revised They 9.95

STATEMENT OF THE CASE

9.54.020 in section filed Spokane "violating Was for (T.9) State of Washington an information Of crime the with 1959, of the petitioner 26, Court May Qu Superior charging

that petitioner did "without to possession there of Washington, intentionally take and drive away a motor vehicle, of the Revised Code the permission of the owner or person entitled in = 'Joy Riding,' " p. A-1) Chevrolet automobile, (Appendix A, infra, as commonly known

the Spokane County supervision of Counsel was thereafter appointed to represent petitioner, as a condition of probation. thereupon infra, pp. A-1 the years, Was guilty to the two pursuant 10) 1959, he was arraigned before Petitioner entered a plea of to remain under entered, placing petitioner on probation for E. (Appendix A, charge and an Order of Probation deferred viding for thirty days confinement The imposition of sentence was was instructed RCW 9.95.200@and, 9.95.210 State Parole Office. Superior Court. June 17, petitioner

offense Juvenile and mental institutions within the State of Washington; old when he pleaded guilty 27-28). His first above-described completed the eighth he had progressed through a variety of conflict of opinion between two of the facilities as arose out of the whether he was a psychopathic delinquent (T. on probation. He had not to C-14). Petitioner was seventeen years appearance in Superior Court C-13 (Appendix C, infra, pp. since 1956 was placed grade, and

old, was Approximately four months after petitioner was placed concerning He was not probation, the Spokane County Prosecutor's office moved his probation revoked on the ground that petitioner had a.hearing was held in the Spokane County Superior Court 12). Petitioner, still seventeen years volved in a burglary on September 15, 1959 (T. 11, no inquiry accompanied to the hearing by his stepfather. court made and the October 23, 1959. counsel sented by

crucial four months earlier involved in the alleged 36) the Court heard testimony the he 16, and and in the affirmative E 23): officer, to counsel, to be represented by counsel as follows, (T. appointed counsel who represented petitioner a parole and probation of a fright if he had been admission, answered portion of the proceedings went advised and petitioner asked petitioner Following petitioner's Petitioner was not he wished Weaver, William D. burglary,

connection denied breaking and wherever it was? short in this it report boy Just. make the that th you state that the "THE COURT: place out sweet.

'A That is correct.

"THE COURT: And he did so deny it?

"A Yes.

and up, Jerry. Probation it is the further judgment be confined in the Washington all. Handing hat I previously that COURT: All right, that's al caer revoking the probation that revoking the probation that you. Now, stand up, Jerry you revoked, that Reformatory granted you.
having been re order order "THE State years. the

cross-examine entered (T. 13) no appeal Was Judgment was entered and petitioner court Years and the affording petitioner an opportunity to to imprisonment for a maximum term of ten of his right to appeal, own behalf, "joy riding" or state anything in his 12). H. ţ, revoking probation guilty advised of not previous plea Petitioner was Without witness taken. sentenced Order Was

State Supreme Court for writ of 1959 October 23, filed a pro se petition with the Washington sentence of judgment and petitioner 0-2) the (T. In 1965, that corpus alleging habeas

Were sentence were record demon-Was s says juay....s the reconstinct, as the reconstinct when the petition w pro se when dates. 1.8 corpus on June 17, 1959. This ras T. 13. Petitioner was the habeas about for mistaken entered on T strates.

The petition for writ of habeas corpus relied upon the Washington Sixth Amendment to the Constitution of sentencing. during represented by counsel nor at the time the probation revocation hearing, was void because he had not been State Constitution and the m the United States.

denying the application delivered by the Washington in this fashion: Appendix B, three. The majority opinion states the issue State Supreme Court on June 23, 1966, corpus by a vote of six to comprehensive opinion was habeas

"The basis of this petition for a writ of habeas corpus may be concisely described as follows: Jerry D. Mempa was not represented by counsel at the peremptory hearing in the Spokane Superior Court. when (a) his probation status was revoked, (b) the deferral of sentence was vacated, and (c) its imposition took effect, forthwith. Thus, the problem presented to us for decision is whether probationer Mempa was entitled to counsel as a matter of constitutional right in relation to any one or all of the foregoing aspects of administration of the state B-2) infra, p. (Appendix B, probation system.

excerpt (Appendix summarized in this well opinion is B-12): The Court's infra,

"We have previously held that there are no constitutional rights respecting the acquisition of probation status. And it is furthermore our reasoning that there are no constitutional rights involved in the termination or revocation of probationary status, or in respect to the concomitant operations of the superior courts involving imposition of either (1) suspended or (2) deferred sentences. The function involved, in terms of definitive action, is essentially quasi-administrative or plenary in nature. The operations are essentially no different from those performed administratively by the State Board of Prison Terms and Paroles or by the prison authorities in administering other phases of penal administration in the state function Washington." penal administration in the state

rejected the authority of Gideon Court then specifically The

^{3/} Petitioner, still pro se, was not represented dur "argument" before the Washington State Supreme Court. General's office appeared for the respondent.

Zerbst, 295 U.S. infra, and concluded as follows (Appendix B, (1963), and Escoe vs. Wainwright, 372 U.S. 335 490 (1935),

a petition for writ of habeas be successful in this court where is whether the probationer was constitutional due process rights He simply has none." or the hearing. appeal, accorded his the question No. corpus,

REASONS FOR GRANTING THE WRIT

(1963); Escobedo vs. Illinois, involved (1966). By an anachronistic (1963); chancellor's grace," the court below held that petitioner did not as critically sig-"right-privilege" and "the presents right to counsel issues as significant right to counsel when he was peremptorily constitutional sense as the proceedings in White criminal liberty, and as demanding of resolution by this Court as the issues 372 U.S. 353 Alabama, reputation, his future record, his appellate remedies, first time, sentence was to be imposed upon a at which the stakes were his The proceeding against petitioner was (1963), and Hamilton vs. California, 335 concepts of U.S. U.S. 378 U.S. 478 (1964); Douglas vs. Wainwright, 372 reliance upon the ancient Arizona, 29 constitutional hailed into a hearing 373 U.S. and Miranda vs. ø nificant in This 52 (1961). Maryland for the charge.

Recent decisions of this Court have established the right proceedings against an accused. the area Professor Sanford H. article, The in his has labeled "Peno-Correctional" stages of Unfortunately one gap remains to counsel at various Kadish

that "certain queries present themselves with vigor" as to the fairness of such a hearing where the right to counsel is not afforded. (T. 47). Furthermore, the respondent in effect conceded a portion of petitioner's case, in that respondent urged the court not to retreat from previous rulings that there was a right to counsel at the time of imposition of sentence following probations revocation. (T. 43). The court nevertheless overruled these prior (Appendix B, infra,

in the Peno-Correctional Process and the Expert-Counsel

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of this This case involves the right to counsel during one phase 46 Minn. L. Rev. 803 (1961) (hereinafter cited "Kadish, gap -- proceedings after conviction following a trial and sentence are entered. and before judgment guilty,

н

A PROBATION REVOCATION PROCEEDING IS A PART OF THE CRIMINAL PROCEEDING, AND THE ASSISTANCE OF COUNSEL IS ESSENTIAL TO A FAIR HEARING.

hearing as essentially quasi-administrative in nature, stating that penal administration in the State of Washington (Appendix B, infra 68 Wash. Dec. 2d (Advance Sheets) 283, p. B-12)." But as even the court below has stated, "the courts must look to substance rather than labels in ascertaining whether administratively by the State Board of Prison Terms and Paroles constitutional rights to the assistance of counsel have been The opinion below characterizes a probation revocation authorities in administering other phases "the operations are essentially no different from those Louie, 287, 413 P.2d 7 (1966), State v. or by the prison violated."

does not follow Even acknowledging that the original order granting probation grace," it "the chancellor's of. exercise been an have

^{5/} This case is also of significance to the administration of federal criminal justice. The Criminal Justice Act of 1964, 78 Stat. 552, 18 U.S.C. \$ 3006A(b) (Appendix A, infra , p. A-1) provides for the appointment of counsel in a "criminal case." United States v. Boyden, 248 F. Supp. 291 (S. D. Cal. 1965) said a probation revocation hearing is a "criminal case," and that accordingly an attorney appointed to represent an indigent in such a hearing is entitled to compensation pursuant to the Act. However, on June 13, 1966, the Comptroller General off the United States disagreed, holding that payment would not be made because such hearings are not "criminal cases" and, further, that there is no constitutional right to legal representation in such safely be anticipated that all federal courts will henceforth not further court waits until a unsel in such hearings, which will pose the retro Gideon v. Wainwright, supra, if this Court waits to adopt the position urged herein by petitioner spectre of ater day

is ordinarily permitted to return to his community, his family and The fact remains that the recipient of a deferred sentence he is free, for his personal liberty is but slightly restricted. Slochower v. Board of Educ., 350 U.S. 551 (1956) (public employonly to behavioral restrictions and conditions "In a very realistic rights surround its revocation. Cf. Schware v. Board to state bar); opinion.) 232 (1957) (admission status. (Appendix C, infra, p. C-3, dissenting arising out of his probationary Bar Examiners, 353 U.S. his job, subject ment).

court finds that the probationer is "violating significance, the probationer is accorded the right, after (Appendix C, infra In the State of Washington, this probationary status may be RCW 9.95.220 (Appendix A, infra, p. A-2). Furthermore, of par-'quasi-administrative' proceedings which do not even a successful probationary period, to come before the Court and thus clear his record and remove outstanding penalties and dis-These fundamental rights, as stated by the dissent in criminal practices, is abandoned to improper associates, or living a vicious life. "should not be subject to nullification by the whim of afford the right to be represented by counsel at the time of p. A-2 to petition for negation of his conviction and dismissal entering the nullifying judgment and sentence. RCW 9.95.240 (Appendix A, infra, engaging of his probation, or revoked only if the peremptory abilities. p. C-4) ." ticular below,

to pass upon the most significant of questions, i.e., liberty A probation revocation proceeding is a judicial hearing conright to be heard. As stated by Mr. Justice Sutherland in Powell wishes and needs to be heard, and when due process protects his time when a It is obviously a (1932) 287 U.S. 45, 68-69 sentence, etc. reputation,

comprehend small and "The right to be heard would be, in many cases, of little avail if it did not comprehe the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. He requires the guiding hand of counsel at every step in the proceedings against him."

And see Gideon v. Wainwright, supra.

goes on to hold that the federal probation statute requires: Escoe v. Zerbst, fortunately, was not as bad as it might seem, for courts in this country have unfortunately not recognized the right to counsel at probation revocation proceed-Cardozo in Escoe vs. Zerbst, 295 U.S. 490 (1935), to the effect ings. Much of this can be traced to dicta used by Mr. Justice of grace a crime," and that the Constitution does not The result "favor." that "probation or suspension of sentence. is an act the Burns v. United States, 287 U.S. 216 (1932). require notice or hearing on revocation of federal one convicted of

"enable an accused probationer to explain away the accusation." While this does not require 'a trial in any strict or formal sense,' it does require 'an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper. [295 U.S., at 493]" Kadish, supra, at 815. failure

appointment counsel, and it preceded Gideon v. Wainwright, supra. issue of the moreover, did not involve the That case,

1965), but the decision was based primarily hearing was recognized in United States ex rel Harton v. Wilkins, a probation revocation 1965), and the gases court approach in this area is typified by Warden, 351 F.2d 564 (7th Cir. The right to counsel during 342 F.2d 529 (2nd Cir. The federal Brown v. therein.

the imposition Many of the federal cases deal with probation after the imsentence, and are therefore distinguishable from this case. v. Warden, supra.

Gideon v. Wainwright, recognize a right to counsel at such hearings. See, e.g., Kadish, 534, 204 A.2d 450 (1964) (hearing to in the And see Commonwealth ex rel. violates The Equal Protection Clause of the Fourteenth Amendment, id., also refused to 644 (1965) [Denial of counsel to an indigent probationer at 816, fn. 65; Note, Legal Aspects of Probation Revocation, revoke probation and impose sentence is a "critical stage" But many states have recognized the right. Maryland, supra); and Hoffman v. upon Pennsylvania law. Many state courts have citing Griffin v. Illinois, 351 U.S. 12 (1956).] exists, citing L. Rev. 311, 328-330 (1959). proceedings and right to counsel Remeriez v. Maroney, 415 Pa. supra, and White v. Colum P. 2d

supra, In commenting upon the decision in Brown v. Warden, No. 9, p. the editor of Criminal Law Bulletin, Volume I, 1965), 'had this to say:

to counsel "We disagree. Although the initial grant of probation may be a matter of grace, its revocation nevertheless results in a deprivation of the probationer's liberty. It is imperative, therefore, that the revocation proceedings be consonant with established A.2d 450, 451 (1964). CI. Which holds
Behrens, 375 U.S. 162 (1963), which holds
that a federal defendant is entitled to couns
upon his return to the District Court for resentence after receiving a maximum sentence
sentence after receiving a waximum sentence principles of due process. In our opinion, these principles are violated where a defendant is denied the assistance of counsel in connection with the evidentiary hearing held to establish the alleged probation violation See United States ex rel. Harton v. Wilkins, 342 F.2d 529 (2nd Cir. 1965); Commonwealth Harton v. Wilkins, 5); Commonwealth Y, 415 Pa. 534, 20 Remeriez v. Maroney, 415 Pa. States v. 451 (1964). Cf. United States v. 451 (1964). (P) rel

counsel 7/ A survey was taken of trial court judges in the six largest Wash-ington State counties (Cowlitz, King, Kitsåp, Kittitas, Spokane and Yakima). Most of the judges responded that they do not appoint counse for probation revocation hearings, "however, some of those who do not appoint counsel have some qualms about the fact that they have not done so." Amandes and Stevens, The Defense of Indigent Persons accused of Crime in Washington - A Survey, 40 Washington Law Review accused of Crime in Washington 78, 85 (1965).

counsel at a probation revocation proceeding was Draft No. [Tent. 301.4 Code in Model Penal (1955)]. also recognized 40 The right (1954)

supra, The basic nature of probation revocation proceedings, and the in Kadish, counsel at this stage, is well summarized need for at 833:

to be determined s and whether it constituted a violation of stated condition, entitling the court or agency consider whether revocation is thereby indication the character of the issue to be determined of justice. Indeed, in many contested revo-cation proceedings, the conduct charged actually constitutes the commission of a criminal act. No doubt it is simpler and faster for a court or a board to make the determination by what-ever means seem to it sufficient to persuade --whether it be an informal talk with the pargle officer or a brief interview with the prisoner or a written report by an investigator. But it would seem patently at war with the central concept of procedural justice to deny to a d the fact that the continued liberty of a rson depends on the outcome, it is difficult understand the view sometimes expressed that lawyer has no proper business in these matters e central task of ascertaining whether the ke the opportunity charge against him actually prisoner has committed the acts alleged, and measuring the acts proven against a standard to which he was obliged to conform is precisely the business of the criminal trial itself where the right to the assistance of counsel has been recognized as one of the 'immutable principles of justice.' Indeed, in many contested revoof the conditions on which release was granted, involves, if not exclusively, then at least centrally, the fairly narrowly focused issue of what the conduct of the releasee actually deny to a in violation and revoke justice to on with his liberty at state and meet the specific the benefit of counsel." to recommit because of conduct determination "[T]he was and person person with and

-- when he was first taken into custody (T.23) counsel probationer. The decision to admit or deny the violation charged The right to counsel at probation revocation hearings must conditioned upon denial of the alleged violation by the For example, petitioner denied the probation Cf. Miranda But he admitted it when he appeared at the hearing without crucial and requires the advice of counsel. burglary supra. violation --Arizona, not be

examine witnesses against him, or present mitigating circumstances Only with a lawyer at his side would he have been able to put the state to its burden of proof, or effectively cross-Would he have surrendered as quickly if he had had in an attempt to dissuade the judge from revoking probation. (T. 22). lawyer?

diminution of the significance which this particular fact obviously attached particular significance to the fact that petitioner had evidence in Only an In deciding to revoke probation, the trial judge attorney could have presented effective arguments or originally denied committing the violation (T. 23). trial judge. to the

237 P.2d 734 (1951); State vs. Shannon, 60 Wn.2d plea of guilty. RCW 10.40.175 (Appendix A, infra, p. A-3); State vs. Finally, and of great importance, the statutes and decisions of the State of Washington provide that even at this stage of the proceedings, petitioner could still move to withdraw his original 376 P.2d 646 (1962). It is fair to assume that petitioner ignorant of the right to so move, and, of course, neither the of it. motion prosecutor nor the trial judge advised petitioner is useless if no attorney is present to argue the Farmer, 39 Wn.2d 675,

H

SENTENCING IS A CRITICAL STAGE IN THE CRIMINAL PROCEEDING, AND THE ASSISTANCE OF COUNSEL IS ESSENTIAL.

defendant does not have a federal constitutional right to be repre-The court below has made the surprising pronouncement that a tion of probation, he is for the first time sentenced on the This ruling departs from prior decisions and a plea of guilty counsel when, following charge. sented by criminal

where probation to a situation opinion below applies equally a contested trial.

this court, and from most decisions of other courts within the United States

The language and "punishment is fixed" as a "right, ancient in the law, [which] pending legislation providing that a defendant's presence was not absence of the prisoner and his counsel. Since this decision Criminal Procedure, there was no necessity for the Court to reach of the Federal Criminal Rules, which the right to be present when the "judge's final words are spoken" to be present encompasses Nevertheless the Court characterized opinion concurring in the judgment, Mr. Justice Harlan referred In United States vs. Behrens, 375 U.S. 162 (1963), it was a statement in his own behalf and to present any information in held to be error to impose a final sentence upon a prisoner in was based upon the language of Rule 43 of the Federal Rules of In a separate the "possible constitutional issues which would be raised" by requires the court to 'afford the defendant an opportunity required at final sentencing. 375 U.S., at 168, fm. 2. 375 U.S., at 165. the opinions recognizes that the right right to be present with counsel. mitigation of punishment.' " recognized by Rule 32 (a) the constitutional issue.

of

found elements of substantial test used in assessing right to counsel claims under Betts v. Brady, assessing the constitutional claim was substantially similar to the It may fairly be said that the Court has already ruled upon In Townsend v. Burke, 334 U.S. 736 (1948), petitioner was right to counsel and without being offered assistance of counsel. convicted on a plea of guilty to non-capital offenses, and subsequently asserted a violation of due process in the acceptance of his plea and imposition of sentence without being advised of his ingly, a due process violation was found. The test employed in prejudice which presence of counsel would have prevented. In reviewing the proceedings, the Court

supra, and through the operation of Townsend v. Burke, supra, The Gideon case, by overruling Betts v. trial. sentenging as it does at counsel at Kadish, supra, at 806: 455 (1942). the same right to 316 U.S.

Accused at Time of Sentence as Requiring Vacation Thereof or Other and state decisions have recognized the right e.g., Kadish, supra, at 806-812; Annot., Absence of Counsel with some variations in rationales. 2d 1240 (1951) at sentenoing, Most federal 20 A.L.R. counsel

can be presented, and objections would be raised to illegal with the trial judge 099 and an appeal may not be taken until probation is revoked (1938); State v. Rose, 42 Wn.2d 509, 256 P.2d 493 (1953). This is as critical a function as trial, defendant is placed upon probation, a final judgment has not been the preliminary hearings and arraignment discussed in White v. State v. McDowall, 197 Wash. 323, 85 P.2d the stage of the proceedings at which matters in mitigation of but the motion must not be denied where it is evident that the of justice will be served by permitting entry of a plea of not withdraw a plea of guilty can be made any time before judgment A motion to RCW 10.40.175 (Appendix A, infra, Furthermore, where sentencing is deferred and supra. Farmer, Maryland, supra, and Hamilton v. Alabama, supra. discretionary supra. State v. Farmer, plea is p. A-3); State v. Shannon, supra; Sentencing in Washington is State v. ø and sentence are entered. of sentence imposed. guilty in its stead. to permit withdrawal sentences. entered,

serving time ... jr. State v. Proctor, n appeal is no sefer sentencing is defer is permissible only in time in jai is granted. However, this is jis conditioned upon a fine or so limited to claimed trial error.

2d (Advance Sheets) 808, P. An modified. recently rule was 9/ This r Wash. Dec.

timing of and need for an appeal presents itself, and a probationer being sentenced needs advice concerning his appeal rights as much conviction the situation in Consequently the the of guilty, following equally to issues are available on appeal following a plea trial. as he would if he were sentenced immediately which probation is granted following a applies the court below of guilty. announced by

a denial 413 P.2d petitioner did not have a hearing when jurisdiction was waived by the juvenile court, and he accordingly might the in-Courts lack jurisdiction over juveniles unless the juvenile court or, if he case. Petitioner's plea of guilty precluded an appeal on issues issue Superior H The right of appeal is of particular significance in this jurisdiction after a hearing. See, e.g., Kent v. United the circumstances had moved to withdraw the plea, he could have appealed from But this petitioner had an to raise on appeal, quite apart from the denial of counsel. of 481, the Washington Supreme Court ruled that the ther than the validity of the statute, the sufficiency State V. Rose, supra. (advance sheets) this issue on appeal if the court, or **2**d 68 Wash. Dec. State v. Rose, supra. formation, the jurisdiction of under which his plea was made. to raise t counsel. (1966) Dillenburg v. Rhay, have been advised represented by u.s. thereof. waives 940

III

PETITIONER DID NOT WAIVE COUNSEL

representation by or hearing during his revocation did not request Admittedly, petitioner counsel of appointment

retrodetermined, and rehearing was 6, with argument scheduled for Advance Sheets) 953 (1966). corpus for habeas (Advance filed a petition for precisely this is yet to be de n July 7, 1966, 2d 7. Dec. 68 Wash. recently eme Court on Washington Supreme Couractivity of Dillenburg granted in Dillenburg o September, 1966. 68 Wa Petitioner

knowledge of his rights to enable him to completely and intelligently only 458 (1938) Of and his limited education and background mitigated against Cochran, 369 U.S. Moreover, the petitioner was then seventeen years counsel is a constitutional requisite, the right to be furnished "[I]t is settled that where the assistance of Arigona; waive right to counsel at said sentencing proceeding." (T. 39) below deals The respondent acknowledged to the court below that " it would . possessed sufficient prior with the merits and completely ignores petitioner's failure to a knowledgeable waiver. See Johnson v. Zerbst, 304 U.S. See Miranda even greater importance, the opinion of the court But as stated in Carnley v. request." the hearing. • • seem doubtful that petitioner ø does not depend on during sentencing. 506, 513 (1962), counsel at of counsel request of age, supra, time

p. B-12) that waiver might have occurred because petitioner pleaded Alabama. This novel waiver theory is patently insufficient a right guilty and accepted probationary status on the basis of the Cf. N.A.A.C.P. v. The court below does seem to indicate (Appendix B, the court said, do not confer stated: berow to deprive this Court of jurisdiction. the dissent existing statutes, which, 449 (1958). As 1 counsel. 357 U.S.

xpresses some doubt as to petitioner's offully comprehend the nature of his at the time of the revocation hearing that order knowingly, intelligently ily waived all constitutional rights even the attorney it would be someramifications of to assume under the circumstances, it wor he fully appreciated all rader of deferred sentence "Against this background, completely waived all expresses to fully of order of ability to situation general

sentencing stage of the proceedings. McClintock v. Rhay, 52 Wn.2d 615, 328 P.2d 369 (1958), held sentencing to be part of a criminal proceeding, requiring the appointment of counsel. The McClintock case, which preceded petitioner's plea of guilty, was overruled in this case. In fact, the trial court ignored McClintock in imposing sentence without to the 52 Wn.2d 615, time as first so for the saying Was court below appointing counsel.

With respect to subsequent proceedings. Johnson v. Zerbst, 304 U. S. 458 . . . (Appendix C, infra, p. C-14)

ΔI

THE DENIAL OF COUNSEL TO AN INDIGENT PROBATIONER IS AN UNCONSTITUTIONAL DISCRIMINATION.

Clauses of the Fourteenth Amendment "prohibit the accident of economic S See Douglas V. bation revocation hearing obviously will do so. The decision below and Equal Protection for his pro-Illinois, 351 thereby creates discrimination between probationers who can A probationer financially able to employ counsel criterion for right to counsel. (1963); Griffin v. C-13, Process ò The Due infra, cannot. (Appendix S. 353 who đ ability from being California, 372 U. those (1956)." counsel and

CONCLUSION

the petition should be the reasons set forth above, For granted.

Respectfully submitted,

Evan L. Schwab 1405, 1411 Fourth Avenue Seattle, Washington 98101 Donald A. Schmechel 1405, 1411 Fourth Avenue Seattle, Washington 98101 Michael H. Rosen
American Civil Liberties Union
of Washington
2101 Smith Tower
Seattle, Washington 98104

ATTORNEYS FOR PETITIONER

August 5, 1966.

STATUTES

\$ 3006A (b): 18 United States Code, Statutes '552,

States commissioner or the court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the defendant waives the appointment of counsel, the United States commissioner or the court, if satistied after appropriate inquiry that the defendant is financially unable to obtain counsel, shall appoint counsel to represent him. The United States commissioner or the court shall appoint separate counsel for defendants who have such conflicting interests that they cannot properly be represented by the same counsel, or when other good cause is shown. Counsel appointed by the United States commissioner or a judge of the district court shall be a sected from a panel of attorneys designated or approved by the listrict in which of counsel, -- In every criminal case in wlyed with a felony or a misdemeanor, other and appears without counsel, the United is charged the defendant is charc than a petty offense,

Revised Code of Washington (RCW):

person who shall without the permission of the owner or person entitled to the possession thereof intentionally take or drive away any automobile or motor vehicle, whether propelled by steam, electricity or internal combustion engine, the property of another shall be deemed guilty of a felony, and every person voluntarily riding in or upon said automobile or motor vehicle with knowledge of the fact that the same was unlawfully taken shall be equally guilty with the person taking or driving said automobile or motor vehicle and shall be deemed guilty of a felony.

9.95.200 Probation by court--Board to investigate. After conviction by plea or verdict of guilty of any crime, the court upon application or its own motion, may summarily grant or deny probation, or at a subsequent time fixed may hear and determine, in the presence of the defendant, the matter of probation of the defendant, and the conditions of such probation, if granted. The court may, in its discretion, prior to the hearing on the granting of probation refer the matter to the board of prison terms and paroles or such officers as the board may designate for investination. cumstances surrounding the crime and concerning the defendant, his proper record, and his family surroundings and environment. In case there are no regularly employed parole officers working under the supervision of the board of prison terms and paroles in the county or counties wherein the defendant is convicted by plea or verdict of guilty, the court may, in its discretion, refer the matter to the prosecuting attorney or sheriff of the county for the crime and concerning the defendant, family surroundings and environment. report to the court at a report. investigation and gátion and

9.95.210 Conditions may be imposed on probation. The court in granting probation, may suspend the imposing or the execution of the sentence and may direct that such suspension may continue for such period of time, not exceeding the maximum term of sentence

conditions set forth and upon such terms and shall determine.

5

thereof, may in its discretion imprison the defendant in the county jail for a period not exceeding one year or may fine defendant any sum not exceeding one thousand dollars plus the costs of the action, and may in connection with such probation impose both imprisonment in the county jail and fine and court costs. The court may also require the defendant to make such monetary payments, on such terms as it deems appropriate under the circumstances, as are necessary (1) to comply with any order of the court for the payment of family support, (2) to make restitution to any person or persons who may have suffered loss or damage by reason of the commission of the crime in-question, and (3) to pay such fine as may be imposed, and court costs, including reimbursement of the state for required, and may require bonds for the faithful observance of any and all conditions imposed in the probation. The court shall order the probationer to report to the board of prison terms and dition of said probation to follow implicitly the instruction. paroles or such officer as the board may designate and as a condition of said probation to follow implicitly the instructions of the board of prison terms and paroles. The board of prison terms and paroles and regulations for the conduct of such person during the term of his probation.

associates, or living a victous life, he shall cause the probationer to be brought before the court wherein the probation was granted. For this purpose any peace officer or state parole officer may recourt may thereupon in its discretion without notice revoke and terminate such probation. In the event the judgment has been pronounced by the court and the execution thereof suspended, the court may revoke such suspension, whereupon the judgment shall be in full force and effect, and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformation as the case may be Whenever the state parole officer or other officer under whose supervision the probationer has been placed shall have reason to believe such probationer is violating the terms of his probation, or engaging in criminal practices, or is abandoned to improper associates, or living a vicious life, he shall cause the probation pronounced the sheriff to be as the case may be. If the judgment has not been pronc court shall pronounce judgment after such revocation of on and the defendant shall be delivered to the sheriff tesported to the penitentiary or reformatory, in accordance imposed. Violation sentence transported with the sen bation and

bation completed. Every defendant who has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, may at any time prior to the expiration of the convicted be permitted in the discretion of the court to withdraw his plea of guilty and enter a plea of not guilty, or if he has been convicted after a plea of not guilty, the court may in its discretion set aside the verdict of guilty; and in either case, the court may thereupon dismiss the information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted. The probationer shall be informed of this right in his probation papers: PROVIDED, That conditions

in any subsequent prosecution, for any other offense, such prior conviction may be pleaded and proved, and shall have the same effect as if probation had not been granted, or the information or indictment dismissed.

time to be 10.40.175 Substitution for plea of guilty. At any before judgment, the court may permit the plea of guilty withdrawn, and other plea or pleas substituted. APPENDIX B

OPINION OF THE COURT BELOW

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 38470 EN BANC IN THE MATTER OF AN APPLICATION for a Writ of Habeas Corpus of JERRY DOUGLAS MEMPA, Petitioner,

Washington State Penitentiary,

Filed Jon

Respondent.

JUN 23 1966 1966.

At his arraignment in that court, the petitioner was represented member of the Spokane Bar, and now a judge of the Spokans County He was granted Jerry D. with "joy-riding," as defined and problitted by RCW 9.54.020. This matter involves a petition for a writ of Mempa, with the advice of comsel, entered by court-appointed counsel, Willard S. Roe, then a prominent the privilege of probation status, and the imposition of the Mempa, was charged in the Superior Court for Spokane County The salient facts are: Petitioner, ples of guilty to the charge of "joy-riding." Superior Court. habeas corpus.

Spokane County Prosecutor's Office moved to have mempa's probation Sentence (the statutory maximum term of imprisonment of ten years, subject, sentence was deferred pursuant to the provisions of RCW 9.95.200 Thereafter (approximately two months later), the County actual period of institutional confinement or custody) was then status revoked for violation of the terms and conditions under of course, to subsequent parole board action determining the At a hearing in the Spokane Superior Court, the petitioner's probation was revoked. sentence, order of comitment were entered accordingly. Imposed and, promptly thereafter, judgment, which it had been granted. and 9.95.210.

Spokane Superior Court when (a) his probation status was revoked, the deferral of sentence was vacated, and (c) its imposition The basis of this petition for a writ of habeas was not represented by counsel at the peremptory hearing in the Thus, the problem presented to us for Jerry D. Mempa decision is whether probationer Mampa was entitled to counsel as a matter of constitutional right in relation to any one or all of the foregoing aspects of administration of the state corpus may be concisely described as follows: took effect forthwith. probation system,

Relative to a deferred sentence, RCW 9.95.220 provides:

shall pronounce judgment after such revocation of probation and the defendant shall be delivered to the sheriff to be transported to the penitentiary or the court sheriff to be transported to the penitentiary or reformatory, in accordance with the sentence in-If the judgment has not been pronounced,

people would disagree respecting the desirability of the objective permits special handling of carefully selected criminal offenders the probationer's ostensible "liberty" is somewhat misleading in nature of probation-what it is and is not-may be helpful to an It should first be noted part of the probationer, can be most conducive to the rehabilita who have pleaded guilty, or have been convicted of committing an arrangement is that probation status, with attendant supervision characteristic of the probation device is that the person who is device for the rehabilitation of criminal offenders. Probation Perhaps in one sense the significant regarding the However, fortunate enough to qualify and to have been granted probation Thus, while that probation is a very useful and flexible tool or technique and its emphasis upon law-abiding, responsible conduct on the understanding of our decision herein denying Jerry D. Mempa's of probation and its constructive potential as a modern penal remains in "semi-custody." The purpose or theory of such an In fact, few well-informed the probationer is not confined to a penal institution, he of criminal offenders as useful members of society. status is allowed to be at liberty in the community. At this juncture some observations that he is actually under probation supervision. petition for a writ of habeas corpus. of modern penal administration. offense against society.

a matter of privilege It is not However, probation, or the acquisition of probation status, must be kept in proper perspective. of constitutional right.

or initially implemented solely through an exercise of judicial 259 P.2d 404 (1953). or grace, authorized by the state legislature to be granted discretion by the Superior Court judges of the state. 42 Va. 2d 929, rel. Schock v. Barnett,

conduct -- if not in terms of atonemant or punishment, then clearly in terms of the possibility of their rehabilitation as productive a substantial interest in guiding or conforming their future emotionally unvarnished facts are that probationers have broken Furthermore, the fact must not be overlooked that pro-They have a criminal record; and as a result society No inference is intended that, once having broken And, once again, it should be state has either (a) pleaded guilty, or (b) has been convicted remembered that each such person who is afforded the privilege bationers, as a class, are criminal offenders, both in a legal of an offense problibited by the criminal laws of the state of of probation status by a judge of the superior courts of this But the plain the law, such individuals are forever branded as criminals forever afterward are to be treated as such. and social or community sense. members of society. Washington. the law.

While those having probation status are accorded considerable freedom and liberty, their status and rights in this respect, and the matter of their liberty and freedom as well limitations and termination thereof, are not to be placed in the same category with the quantum of rights the average law with respect to civil liberty

They have exhibited in the past a tendency (at least in one instance) to engage in Stated another way, probationers are not average, consistently deserving law-abiding citizens. legally disapproved antisocial conduct. freedom.

Considering probationers as a class of criminal offenders, particular sphere of administrative prerogative and, by judicial others who have pleaded guilty -- or have been convicted -- and have flat, exercise some sort of supervisory authority over existing there is a close analogy between their status and the status of The administration been committed to institutional custody, supervision and disciand control of the activities and conduct of the latter group seem farfetched to suggest that the courts should invade this is of course performed by the prison authorities. prison administration, standards and practices. pline rather than being granted probation.

trol over the everyday matters of prison administration and/or parole administration is not only not feasible; it is inadvis-The Board fixes Judicial scrutiny, regiew, and conparole of those criminal offenders who have been committed to In addition, the Board has the reference and analogy could also be made to the functions of able in the light of the particular expertise and training authority and the responsibility for administration of the probation and the administration of the probation system, the period of confinement and the terms and conditions of In terms of further insight into the nature of the State Board of Prison Terms and Paroles. state institutional custody. state probation system.

expected to go into the prisons and decide which prisoners should The same can be said of necessary to provide effective institutional custody and parole evitably would be most disruptive of prison programing, super-The courts cannot and should not be Judicial invasion of prison administration incials must have effective control and suthority in order to The point is obvious: prison probation programing and administration. maintain an effective prison program. treated as "trustees." vision, and discipline. supervision.

programs for effective guidance of criminal offenders under their supervision and in their semicustody. Easy access to the courts by probationers to re-evaluate, or challenge, varied aspects of by probation officers is a sensitive area, and one not particu-Administrative and field probation officers, as well convinced that effective supervision of the probation vehicle probation programing could well be disserrous in terms of the larly suited to detailed, over-all, or even general judicial as prison officials, work diligently to establish workable operation of the Washington state probation system. supervision.

However, we are convinced that, while there are some differences It may seem somewhat more appealing and persuasive to to be at large in their committees than would be the case with contemplate according full due process rights and privileges to respect to the termination of the privileges of prison inmates. probationers with respect to the termination of their liberty

and standards controlling the revocation of probation and matters tion and the objectives are basically similar in all three areas o reiterate: there are no constitutional rights respecting the there should be correlatively few, if any, constitutional rights of administration and supervision of those who have been granted inmates, and parolees, the problems of administrain the status and the potential for rehabilitation as between acquisition of probation status. Ingically and rationally, probationers, that status.

our probanature of probation are re-enforced by the following language The above outlined judicial views about the general of RCW 9.95.220, which sets out certain legislative policy This legislation provides as follows: determinations made with respect to the operation of tion system.

in criminal under whose supervision the probationer has been placed shall have reason to believe such probationer is violating the terms of his probation, or engaging in crimin practices, or is abandoned to improper associates, or the judgment shall be in full force and effect, and the defendant shall be delivered to the sheriff to be trans Whenever the state panole officer or other officer The court may thereupon may revoke such suspension, whereupon officer may reafrest any such person withsuch probation. In the event the judgment has been pronounted by the court and the execution thereof susout warrant or other process. The court may tuester in 1ts discrepion without rotice revoke and terminate cause the probationer case the sheriff to be transported to the penitentiary or reformatory, in accordance with the sentence imposed (Italics ours.) ring a victous life, he shall cause the probations be brought before the court wherein the probation be brought before the court wherein the probation OF the penitentiary the judement churt state parole ported to living Was

to require the observance and application of due process standards court, there is nothing in the statute enacted by the legislature It should be noted that the foregoing statute provides delivered to the sheriff for transfer to the state penitentiary. those due process standards which unquestionably are applicable revoked, sentence imposed, judgment rendered, and the defendant While it is true that the revocation of probation does occur in court, and the function is performed by a judge of the superior The statute further prothat any peace officer or state parole officer may re-arrest a and must be observed in the more orthodox aspects of criminal as to this facet of the administration of the state probation We are not inclined, judicially, to impose, and to vides that suspended or deferred sentences may be summarily the court may thereupon, in its discretion, without notice, responsibility for applying to probation probationer without warrant or other process; furthermore, revoke and terminate such probation. law administration. judicially assume

376 P.2d 646 60 Wn. 2d 883, 889, (1962), contains the following statement: Shannon, State v.

following revocation of (f) Imposition of sentence, following revocation or probation, particularly in felony cases, is part of the criminal prosecution within the contemplation of Const. Art. 1, § 22 (emendment 10), at which time a defendant is entitled to be represented by counsel. In re Mc-Clintock v. Rhay, 52 Wn. (2d) 615, 328 P. (2d) 369; In re Levi, 39 Cal. (2d) 41, 244 P. (2d) 403.

(First italicized portion ours.)

The petitioner relies strongly on the foregoing views expressed But the basic doctrinal premise of petitioner's in Shannon.

be applied, or extended and made to apply, in a probation context irgument seems to be that the principle applied in the landmark decision in Gideon v. Walmarisht, 372 U.S. 335 (1963), should

represented by commel and offered no evidence to counter reported As in the instant victed. That court vacated the prior revocation of the criminal The criminal matter, violations of the conditions of probation were reported, thus became an immate of the state penitentiary filled a petition We will first discuss the above-quoted portion of the The former probationer who Probation was The Superior, Court for Thurston The criminal offender was for Thurston County where the prisoner had been tried and con-The matter was remanded to the Superior Court revocation hearing was held at which the defendant was not. present, reached the same result 36 at the previous probation thereupon transferred from probation supervision and custody offender therein initially pleaded guilty to grand larceny. on the question of whether or not probation status should be for a writ of hebeas corpus in the Superior Court for Walla offender's probation and, furthermore, appointed counsel to advise and represent the peritioner at a heaving to be held revocation hearthg when the probationer had not been repre-County, with the defendant and his court-appointed comment decision of this court in State v. Shannon, surra. In other words, probation was noncompliance with the conditions of probation. sentence was deferred, and probation granted. to prison supervision and custody. revoked, and sentence was imposed. revoked and sentence imposed. counsel. Walla County.

and, immediately thereafter, sentence was imposed by the court. defendant in the Shannon case thereupon appealed.

fact represented by court-appointed counsel in the Thurston County hereinbefore, did, in fact, comment upon the right to counsel in However, there was in fact no issue of the right to The language of Shannon cited by the petitioner herein could adprobationer whose status has been revoked has the right to comthe revocation of probation and (b) the imposition of sentence. In the Shannon opinion this court, as indicated his suspended or deferred sentence following revocation of his a probation context; 1.e., the right to counsel apropos of (a) sel in a due-process constitutional sense at the imposition of Superior Court at the time of revocation of probation and the should be quite obvious. The probationer in Shannon was in The issues specifically raised in mittedly be interpreted, and extended, to the effect that a comisel explicitly before this court in Shannon. Shannon are not issues herein. Imposition of sentence. probation.

subsequent imposition of sentence constituted dicta which, upon a hearing concerning revocation of probation and at the time of the facts and the issues involved, and properly limited to the to comsel at further consideration, the court is reluctant and unwilling to application for habeas corpus by Jerry D. Mempa. Furthermore, State v. Shannon, supra, construed on the basis of decision therein, is not apt in terms of the facts in the apply in the instent case as the law of this state. the statements in Shannon as to an alleged right

We also note in passing that In re McClintock v. Rhay, supra -- did not involve revocation of probation and imposition 52 Wn.2d 615, 328 P.2d 369 (1958) -- cited in State v. Shannon, and provides no support for the claim of Mempa for a writ of It is therefore distinguishable on this basis habeas corpus in the instant case. of sentence.

suspended sentence and a situation somewhat akin to the modern concept of probation, as being inharmonious with our reasoning In this connection, we do not read State v. O'Neal, 147 Wesh. 169, 265 Pac. 175 (1923), an early case involving in the instant case.

sunra, and State v. O'Neal, sunra, may be inconsistent with the Insofar as State v. Shannon, supra, In re McClinock, expressed in this opinion, they are hereby overruled.

possible rehabilitation of criminal offenders, probation status, case may be summarized as follows: While probation is a modern privilege to be granted solely in the discretion of the courts. Cur views as to the problem presented in the instant granting, denying, limiting and terminating probation status or the granting of it by the courts, is a matter of grace or In the state of Washington the legislature has established a prescribed that due process standards shall be observed and innovation with much conscructive potential in terms of the limited, but admittedly significant, function performed in state probation system and has provided for its functions, The legislature has not applied by the superior courts of Washington in the very operations, and administration.

in terms of definitive action, is essentially quasi-administrative no constitutional rights respecting the acquisition of probation We have previously held that there are constitutional rights involved in the termination or revocation And it is furthermore our reasoning that there are no of probationary status, or in respect to the concomitant operations of the superior courts involving imposition of either (I) ferent from those performed administratively by the State Board administering other phases of penal administration in the state The function involved, or plenary in nature. The operations are essentially no difof Prison Terms and Paroles, or by the prison authorities in deferred sentences. of criminal offenders. suspended or (2) of Washington.

A criminal defendant adequately represented by counsel, who, with counsel at his side, upon the entry of a plea of guilty or in a trial culminating in conviction accepts probation status of constitutional rights, admittedly pertaining to more orthodox These clearly any right to claim denial of criminal due process procedure in a proceeding involving termination of probation status and the such a context it may even be said there has been a walver of authorize termination of probation and imposition of sentence without notice and without reference to allegations of denial criminal proceedings in the trial courts of this state. does so on the basis of the existing statutes. imposition of sentence.

Underlying petitioner Mempa's claim in the instant

in such a marmer in the forgat or context of the administrano valid claim of deprivation of an alleged constitutional right-(b) deferred the principles announced in the landmark Gideon case should apply or should be extended to proceedings involving revocation of pro-Petitioner Mempa was adequately represented counsel at the time he entered a plea of guilty and accepted accorded full We are not constrained to read or apply indicated, some conjecture that semicustody bation and imposition of previously (a) suspended or due process considerations at the appropriate time. the probation status. Thus, the petitioner was at least not in a deferred sentence, probation, case, there may have been, as edministrative context. tion of probation. sentences. Gideon

295 U.S. 490 (1935), is directly controlling of the instant matter revoked by a federal district judge on as en parte showing without intent of Congress as empressed in the language of the applicable The main thrust The Escoe opinion clearly existence of constitutional due process That decision involved a petitica for a writ of habeas corpus by is that such a procedure clearly contravened the decision of the United States Supreme Court in Escoe v. Zerbst, Irmate of a federal penitentiary whose probation had been negates the applicability of any specific constitutional safe-Nor can there be any valid contention that the federal probation statute -- requiring that "such probationer the probationer being brought before the court. forthwith be taken before the court." and negatives the of the opinion

constituted the sole basis for granting the writ of habeas corpus. rights pertaining to matters involving the revocation of federal The above-mentioned federal statutory requirements

Furthermore, Escos v. Zerbst, supra, did not involve any question of right to counsel -- either at the probation hearing at the imposition of sentence; and right to counsel at either stage of the proceedings is the only question raised by the petition in the instant case.

enunciated in Escoe v. Zerbst, supra, to be controlling relative But there is no further statutory requirefederal statute required the presence of the probationer before the probationer to be brought before the court wherein the pro-Thus, we do not regard the policy considerations The Washington statute, likewise requires that "he shall cause the court during hearings concerning revocation of probation. The appropriate and value judgments of the United States Supreme Court, as ment as to presence of counsel, burden of proof, right to our disposition of the instant matter. confront witnesses, et cetera. bation was granted."

present their side of the story to the court respecting reported cretion of the superior court judges of the state of Washington In all fairness to a probationer -- and consonant with regular and orderly court procedure-we would anticipate scope of any such inquiry or hearing rests solely in the disthat probationers should and will be given an opportunity to violation of the terms or conditions of probation. But the

successful in this court where the question is whether the probationer was accorded his constitutional due process rights at will be or a petition for a writ of habeas corpus, . He cimply has none. the hearing. No appeal,

For the foregoing reasons, we find no merit in nal due process procedural rights in the instant case. The petitioner Mcmpa's allegations of denial of constitutional application for habeas corpus should be denied. ordered.

PINLEY

WE CONCUR:

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ROSELLIMI, C. J	T.		i.	7.00	H	
ROSI	HILL		ULZO	HUMBER	HALE	

DISSENTING OPINION BELOW

No. 38470

tion of criminal judgment and sentence as part of a criminal prost and . 175 (1928), In re McClintock v. Rhsy, 52 Wr. 2d 615, 328 (1962), which inferentially or directly characterize imposioverruling those portions of State v. O'Weal, 147 Wash. 1699, The majority, due process concepts are receiving increasing and expanding atbecause our procedures have been administered in the immediately following conviction or plea of guilty and on tinued and increasing federal court disapproval and supervision in connection with search, arraignment, appointment of counsel, Fortunately, in this state, we have 60 Wn.2d 883, 376 P.2d do this at a time and in an era when constitutional rights and fundamental fairbeen able to adapt to new concepts without undue inconvenience, of state court criminal procedures. We have gone through this bunals. When, however, we depart from fundamentally fair judiecution, have taken, in my view, an unwarranted, unjustified cial processes, and cavalierly authorized discrimination in the tention. And, by so doing, they open the door to and invite ness in the trestment of Individuals before our criminal triunrealistic step backward in the administration of justice. right to founsel between one whose judgment and sentence is HAMILTON, J. (dissenting) -- I dissent. part with befitting and uniform regard to P.2d 369 (1958), and State v. Shannon, and confession procedures. principally.

potentially voidable institutional commitments. Given no requiresituation may be acceptable in some administrative contexts; but due process protections at the trial court level, when and where they can in the first instance be most effectively, efficiently the traditional role of courts in criminal procation procedures will very from defendant to defendant, from Neither does, it lend itself to the efficient adminrevocation procedures which can well lead to questionable and economically provided, is simply not good judicial policy. judgment and sentence may be imposed anywhere from a istration of justice, for to short change an individual of to several years fater, we are inviting probation trial judge to trial judge. representation by counsel, it is inevitable Disparity of standards among the courts in the search, to counsel cases has long since proven it can hardly be said to comport with the dignity of Wisdom and inefficiency of such a course county, and from cial process, or sion end right ments for

have no quarrel with the majority's thesis that an tences and probation are rehabilitative measures which descend Neither do I differ with the theory that deferred senthe grace" of the sentencing errant individual who has been released from official custody speaking, in "semi-custody" by virtue of probationary regulaby way of an order of deferred sentence remains, upon the deserving miscreant "by

of final judgment and sentence arising out of these fine phrases. denial of the right to counsel either at the time of hearing or But, I find little realistic support for the majority' stage of a criminal prosecution as the revocation of probation process right to the chancellor's "grace," but quite another The two It is one thing to say that there is no constitutional or thing to say there are no due process rights at such a and the imposition of final judyment and sentence. simply do not go hand in "hand. It cannot be gainsaid that the recipient of the "grace" sentenced to a quatodial facility, or who is otherwise subjected some very final judgment and sentence. The individual with the order and substantial advantages which do not flow to one who is probationary status. In a very realistic sense he is free, for deferred sentence in his hand is ordinarily permitted to renificant importance, he is accorded the right, after a successof the turn to his community, his family and his job, subject only to behaviorial restrictions and wonditions arising out of his penalties and disabilities. This latter privilege, even if unhis personal liberty is but slightly restricted. And, of sigis a matter of considerable ful probationary period, of coming before the court and petithus clear his record and remove outstanding tioning for a negation of his conviction and a dismissal an order of deferred sentence is the beneficiary of companied by the other benefits, charges. He may

amounts to a substantial right which is afforded by legislative enactment. RCM 9.95.240. Fundamental afford the right to be represented by counsel at the time of enerty, should not be subject to nullification by the whim of perimportance in our society today. It is clearly distinguishable this right, to say nothing of the sacred right of personal libfairness and the dignity of the judicial process dictate that emptory "quasi-administrative" proceedings which do not even tering the nullifying judgment and, sentence. from a procedural right. It

what anomalous. In effect, the majority isolates this particular judgment and sentence following a revocation proceeding is someany time thereafter to and including the time of entry of final (1951), that the recipient of an order of defetred This court has held in State v. Farmer, 39 Wn.2d 675, from his conviction until view that due process concepts are fulfilled by affording coun that such concepts do not contemplate the right to counsel at sel at the time of entry of the order deferring sentence, and the majority's judgment and sentence from the context and concept of the I Thus, sentence is not entitled to an appear entry of final judgment and sentence. 237 P.2d 734

course, it is understood that the right of appeal following either a plea of guilty or a verdict of guilty. Hence, the right to counsel at the time of revocation must be considered However, following a plea of guilty is very limited. However, ferred sentence statute permits entry of such orders context of either form of conviction. 105 right to

judgment and sentence, whether entered with or without an internow appeal for the first time in this prosecution; but, be-The reason for this legalistic tightrope walking is obscure to particularly when considered with the fact that the final ordinary criminal prosecution and says to the individual, you entitled to counsel to advise you of this right or to cause you initially received a deferment of sentence, you are you in determining that a proper sentence is imposed. vening order of deferred sentence, bodes well to deprive an dividual of his personal liberty and to forever nullify any opportunity of clearing his record of the conviction.

They quote with emphasis RCW 9.95.220, which provides in that dispenses with the necessity for some type of hearing or the right to be represented by counsel. On the contrary, by providof which the fairness dealing with revocation of suspended or deferred senin its discretion, without sustenance for their position in unsite to revocation; however, I find little in the statutory ing that the probationer should be brought before the court, assume the legislature anticipated that a judicious the statute purports to dispense with formal notice as a It may be granted probation, or in any reasonable concept of fundamental after rearrest for cause, i.e., violating his proceeding would ensue, during the tice, revoke and terminate probation. superior court may; The majority seek that the fair to

fundamental rights of society as well as those of the probationer victed, incarcerated and paroled person possessed of more fundaerime, would for revocaparole board, (b) to be represented by counsel at such hearing, perole, provided that a perolee charged with a violait should be observed in Thus, we have, the incongruent situation of a conimpartial hearing before the and assume a swarhbuckling "quesi-administrative" attitude the courts should, at this stage of the prosecution, to defend and present evidence on his own behalf. legislature did not process this probationer in a court of law. that the legislature, in enacting standards another mental rights before an administrative board than their traditional concern for fair play and due shore of conviction of would be respected. Certainly, the a defendant. At this point, be entitled (a) to a fair and to afferd to a parole, his 9.95.120. tion of coward

no 'legislative; constitutional or due process requirefor holding a hearing, assessing the reason for revocation, or chat quite a different thing to say there is no legal requirement of formal notice of a projected probation revocation, Again, it seems to me, it is one thing to say なれ affording counsel, if not at the hearing, at least of an appealable judgment and sentence.

the premise qualifies The majority also appear to proceed upon OF convicted stands a person

if in-no other way than through the equal protection the right to personal fully spelled out in the federal and state constitutions clause of the fourteenth emendment to the federal constitution. as valuable and sacred to one who has been convicted safeguards as the right to be present at a judicial it would seem reasonable to conclude that they inhere in those person, by virtue imposition and entry of the appealable final judgof the criminal conviction, waives or forfeits the benefits of and sentence. While these rights as to probationers may revoke his probation, the right to be But, there seems to be little reason or justification right to be represented by counsel either at the hearing or conditional liberty afforded by sp order present explanatory or mitigating evidence, or the deferred sentence, he is immediately shorn of constitutional trespasser into the role of safeguards which otherwise surround a criminal prosecution. advised of the nature of the alleged probation violation, suppose that such a person waives or forfeits such basic constitutional rights, e.z.; the right to further nothing suggests the probability of reformation and warrants that his past of probation. It may be conceded that such a Certainly, there can be little doubt that find second class citizen, despite the fact not: the majority cast such a proceeding designed to co one and partakes of the 4 the time of Herry is traditional not be short,

takes to deprive that person of his personal liberty, conditional preservation of fair standards of justice vanish in the mystical incompatible to say to a defendant that he is entitled son is entitled to be properly heard when a court of law underout, with Scrooge-like finesse, due process protections. Thus, to constitutional safeguards in all the usual facets of a crimclouds of judicial grace. Instinctively one shrinks from this be seriously questioned that the strength of our constitutional autocratic approach, for instinctively one feels that any perall stages form of government lies in the protection afforded to the weak phases of a criminal prosecution for the purpose of parceling and unfortunate, against injustice or arbitrary and capricious whereupon due process concepts and society's interest in the of the proceeding, unless and until he is granted probation, action. And, if this be so, it ill behooves us to sap this strength by isolating, with surgeon-like precision, varibus Neither inal prosecution, including the right to counsel at constitutions that indigetes a contrary belief. that liberty might be. ir seems

potent-innovations in the field of criminology. From this they and probation are comparatively modern, flexible, sensitive and then posit that courts should be slow to translate into consti-The majority next point out that deferred sentences tutional terms the theory that the "privilege" of probation matter of "grace," and that revocation is a matter of distort the probation.concept and attach too much significance to the above quoted words administrative function, and thus seek to carry it beyond conthe revocation procedure as a quasithe normal range of the however, stitutions1 dimensions and beyond The majority, when they characterize process. "discretion."

reject, or modify a recommendasupervision of the convicted few statutory excepoffender., Because both the judge and the administrator may be their, functions became indiscernably commingled, traditionally and a peculiarly function simply because there are albernative solutions availtion of probation or revocation by en administrator does not The adjudication of criminal guilt and the meting the administrative function in the field of penology and concerned with reformation of the offender of an administrative istrative function than granting, denying or modifying a It is no more an that the judiciary is disruptively invading out of statutory punishment is distinctively, in a given case. With but relatively constitutionally a judicial function. vorce decree, and it does not partake basically begins and ends with the and, because a judge may accept, administrative province. that interested

should and do stand as a bulwark between the individual and that the courts prejudiced, wiimsical or arbitrary The Dare and unvarnished truth is possibility of mistaken;

administrative action. And, when the courts obcisantly hesitate Inyolved therein with adequate, even though minimal, constituto surround any facet of their proceedings and any individual safeguards they are abdicating their responsibility. tional

& sented by counsel at that point. The stakes then are the defendant's liberty; his reputation and future record, and his appeland probation and subsequently stands before the same court acmatter of right, a defendant is constitutionally entitled to be reprenow stands barren of a right prosecuting attorney and to some degree by the administrative attorney. If the defendant receives a deferment of sentence cused by an administrative officer of a probation violation, Wille. stakes are identical. The state is again represented by the The state is represented by the prosecuting find no purpose, reason or the granting of probation in the first instance is not a The majority appear willing to concede that, defendant, however, to the assistance of counsel. I fairness in this situation. lete remedies. Tae

matter of practical necessity he should have the assistance of valid factual issue as to the alleged probation violation, the such proceedings into protracted hearings is withough merit and is nothing more than a red herring. If there is a in evaluating his defense, assembling his evidence, The fear that the presence of counsel would tend defendant is not only entitled to a fair hearing, but as a

subpoenaing and interrogating his witnesses, and cross-examining defendant was advised of his situation, and remove the available can be of inestimable assistance to the defendant and intelligently and efficiently advised. In the vast majority of defendant's background, and the alternative solutions of substantially more help than hindrance to the court. At the Here again counsel, with his knowledge of court proced feeling of unfairness that surrounds sending an unrephowever, there is no dispute as to the probation viola matter of vital concern to both the defendant and the The only issue is the nature and extent of the punishthe presence of counsel would assure the court and it is only in this way that the court can be average defendant is otherwise resented person to a penal institution. opposing witnesses. The very minimum, che that the

ness, particularly when administered by and through a court of constitutional safeguards at the revocation stage would weaken In Fairness to any probationer, the procedures utilized arbitrary or whiniscal comthe rehabilitative purposes of probation. Retribution, how-Likewise without merit is the fear that providing revocations founded on accusations arising out of mistake, should always be accompanied by fundamental either cooperation should be designed to avoid the possibility, however aitment does not tend to enceurage udice and caprice. The threat of swift,

successful rehabilitation. Reformation can best be accomplished consistent; and straightforward treatment of the indidoubt it was this thought, in part at least, which the Model Penal Code for The American and. (1954) N Law Institute to provide, in Tent. Drafts Nos. follows: prompted the drafters of 301.4, 26 viduel. No

on the defendant except after a hearing upon written Inc defendant shall have the a guapension or pro-Incresse, the requirements imposed thereby concrovert the evidence against in his defense and to be repreand to be repre-Court shall not revoke to the defendant of the is proposed. The defent to hear and controvert the counsel. offer evidence sented by bation or The action notice

As the majority opinopportunity of having counsel before the superior court in a revocation proceeding throughout the proceeding. It would, indeed, be thereby projecting discrimination between probationers who can realistic matter, those probationers who can afprobation could well -virg s Finally, and perhaps fatally, the denial of counsel ion inferencially points out, in all instances a probationer constitutional questions of discrimination beordinarily be given an opportunity to be heard. As such and the rare superior court judge who would deny them ilege. Yet the majority would deny this right to process tween affluent and indigent probationers. and those who cannot. Due defendant at the revocation stage of ford counsel will be accorded the counsel serious practical and their side

351 U.S. 12, 100 L. Ed. 891, 76 Sup. Cc. 535 (1956) economic, ability from being 353, 9 L. Ed. 2d 311, 83 Sup. Cc. 814 (1963); Griffin See Douglas v. protection prohibit the accident of ariterion for right to counsel. Illinois, 0

edgeably waived any and all rights to due process of law at the cludes that petitioner by accepting a deferred seatence knowlgrade, and that since 1955 he had progressed through a variety majority opinion, as it relates to petitioner, in effect con-Aside from the Turning then from the general to the specific, the including Green Hill Academy, Eastern ity of the position taken by the majority is but emphasized revocation fact that it is extremely doubtful that any such theory of whether he was a psychopathic delinquent. His migrations try of the order of deferred sentence, the harshness and fully explained to petitioner at the time of indicates that petitioner had not completed the record, that at the facilities as State Ebspital, the Diagnostic Center at Fort Warden, State Hospital, and again Rastern State Hospital with is conceded by institutions were under the petitioner was but 17 years of age. the arraignment proceedings and the any subsequent revocation proceeding. CMO 13 of opinion between the latter and supported by the cese. facts appearing in this of state institutions these the offense, all in 1959, general, Waiver Was time of further

of the offense for which he is presently in custody. court His first appearance in superior fuvenile court.

fully comprehend the nature of his situation at the time of the revocation ciated all ramifications of the order of deferred sentence and and competently waived all constitutional rights with respect to assume that he fully apprehearing. And, under the circumstances, it would be somewhat Against this background, even the accorney general at the time of entry of that order knowingly, intelligently (1933). Zerbst, 304 U.S. expresses some doubt as to peritioner's ability to 58-Sup. Ct. 1019, 146 A.L.R. 357 to subsequent proceedings. Johnson v. a strain, to say the least, L. Ed. 1461,

in summary and in conclusion, I would

- Reaffilm the right to counsel at the time of im-O'Neal, McWintock 9 of gentence as established in Shannon cases, supra; position
- In re Jaime bationer is not entitled to counsel at the revocation hearing, 59 Wn.2d 58, 365 P.2d 772 (1961), which holds that a and and afford such right at all future revocation hearings; (2) Prospectively overrule that portion of v. Rhay,
 - Crant the writ of babeas compus and remand partcourt for rehearing and resentancing tioner to the sentencing (3)

LAMBITON, J

A concur in the result of this dissenting opinion.

Office-Supreme Court, U.S. FILED

NOV 25 1966

IN THE

SUPREME COURT DAVIS, CLERK

OF THE UNITED STATES

OCTOBER TERM, 1966
No. 16

JERRY DOUGLAS MEMPA,

Petitioner,

V

B. J. RHAY, SUPERINTENDENT OF THE WASHINGTON STATE PENITENTIARY, AT WALLA WALLA, WASHINGTON, Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

JOHN J. O'CONNELL, Attorney General of the State of Washington,

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IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1966 No. 424

JERRY DOUGLAS MEMPA,

Petitioner.

V.

B. J. RHAY, SUPERINTENDENT OF THE WASHINGTON STATE PENITENTIARY, AT WALLA WALLA, WASHINGTON, Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1966 No. 424

JERRY DOUGLAS MEMPA,

Petitioner,

B. J. RHAY, SUPERINTENDENT OF THE WASHINGTON STATE PENITENTIARY, AT WALLA WALLA, WASHINGTON, Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

To: THE HONORABLE EARL WARREN, CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The petitioner, JERRY DOUGLAS MEMPA, prays this court to issue a writ of certiorari to review the judgment of the Supreme Court of the State of Washington denying the petitioner's application for a writ of habeas corpus. The Opinion of the Supreme Court of the State of Washington in this case is reported at 68 W.D.2d 871 (Adv. Sheet Vol. 19) 416 P. 2d 104 (Adv. Sheet Vol. 1).

This brief is submitted in opposition to the granting of certiorari, both on the merits and for the further reason that the petitioner will be afforded relief upon a presently pending application for habeas corpus before the Sapreme Court of the State of Washington.

SUPPLEMENTARY STATEMENT OF CASE

The petitioner was apprehended by the police of the City of Spokane on April 28, 1959, on the belief that he had participated in the taking of one or more automobiles without the permission of the owner. He was placed in the custody of the Spokane Juvenile Detention Home. On April 29, 1959, the petitioner escaped from the detention home and during his absence on escape, and on May 1, 1959, the juvenile court entered its order relinquishing its exclusive jurisdiction of petitioner, who was under 18 years of age, (RCW 13.04.010) and transferred the matter "to the prosecuting attorney of Spokane County. State of Washington, for prosecution under the provisions of the Criminal Code". On May 18, 1959, the petitioner surrendered himself to the Sheriff of Spokane County at which time he was accompanied by his stepfather.

On May 26, 1959, an Information was filed by the prosecuting attorney of Spokage in the Superior Court for Spokage County charging the petitioner with the crime, a felony, of TAKING AND RIDING IN A MOTOR VEHICLE WITHOUT THE PER- MISSION OF THE OWNER in violation of provisions of RCW 9.54.020.

On June 17, 1959, the petitioner was brought before the Superior Court for arraignment and the taking of his plea to the charges as contained in the Information. He was then represented and was accompanied by his counsel, Mr. Willard Roe. At that time, the Information was read to the petitioner and he was then offered an additional 24 hours within which to enter his plea and being asked whether he wanted to plead or wait 24 hours, he indicated that he desired to enter his plea at that time. Upon being asked what his plea was to the crime as contained in the Information, the petitioner entered a plea of "Guilty". Thereafter, after considerable discussion between the court, the prosecuting attorney, Mr. Willard Roe, petitioner's attorney and the petitioner, the following took place.

THE COURT: You may stand up. Is there anything you want to say on your own behalf before the judgment of the court is pronounced in this case?

THE COURT: Anything else you want to say? MR. MEMPA: No.

THE COURT: Very well. It is the further judgment of the court that you be confined in the institution for a maximum period of ten years. Now, I am going to suspend every bit of that except thirty days. I want you to serve thirty days actually on this. I want to point out to you now

that when you are released you are going to be under observation, not of the juvenile officers, but of the state parole officers.

(Taken from transcript of proceedings filed in *Mempa v. Rhay*, Supreme Court No. 38470). Appendix B, page 54

On October 23, 1959, the petitioner was back before the Superior Court for Spokane County upon the motion of the prosecuting attorney for the revocation of his probation. At that time, the petitioner was not accompanied by counsel nor represented but was accompanied by his stepfather, Mr. Dickerson. Following the hearing on the motion to revoke probation the court stated as follows:

THE COURT: All right, that's all. Hand up the order revoking the probation. I'm signing the order revoking probation that I previously granted you. Now, stand up Jerry. Probation having been revoked, it is the further judgment of the court that you be confined in the Washington State Reformatory for a maximum period of ten years. The parole board will fix the time you stay there. I am going to recommend a year for you * * * (Tr. 23)

Following the decision by the Supreme Court of the State of Washington in the petitioner's case, on June 23, 1966, the petitioner filed another application for a writ of habeas corpus in the Supreme Court of the State of Washington which was filed on July 12, 1966 and was set for hearing October 7, 1966 in Cause No. 39048. A partial transcript of the record

in said Cause No. 39048 is attached hereto as an Appendix to this brief.

In the petitioner's second application to the Supreme Court of Washington, the petitioner contends that his constitutional rights were violated when the juvenile court of Spokane County relinquished its exclusive jurisdiction over him, without notice, without counsel nor hearing, at a time when he was under the age of 18 years.

The respondent, through the Attorney General of the State of Washington, in its return and answer, has admitted the historical facts of the petitioner's case. On October 7, 1966, the date which the matter had been set for hearing, an order of continuance was entered continuing the matter to a date to be determined after the final disposition of the case of Dillenburg v. Maxwell, 68 W.D.2d 481, 413 P. 2d 940 which controls the determination of the petitioner's case and the relief to be granted to him. (App. p. 34)

REASONS FOR NOT GRANTING WRIT OF CERTIORARI

A. PROBABLE MOOTNESS AS A RESULT OF PETITION-ER'S SECOND APPLICATION FOR RELIEF TO THE SUPREME COURT OF WASHINGTON.

As before noted and touched upon by the petitioner at page 15 of his application for writ of certiorari, Mempa petitioned the Supreme Court of Washington for a writ of habeas corpus which was filed on July 12, 1966 prior to the filing of the petition

for certiorari in this cause. As we have indicated, Mempa at the time of his apprehension on the charges and the conviction which he challenges here, was a juvenile and subject to the exclusive jurisdiction of the juvenile court for Spokane County. (RCW 13.04 .010) Subsequent to Mempa's arrest, the juvenile court relinquished its exclusive jurisdiction and remanded Mempa to the prosecuting authorities of Spokane County for prosecution under the Criminal Code. This was done while Mempa was an escapee, and, of course, without notice, without hearing and without representation by counsel, contrary to the findings of this court in Kent v. United States, 383 US-, 16 L.ed. 2d 84, 86 S.Ct. 1045 which was adopted by the Supreme Court of Washington in Dillenburg v. Maxwell, 68 W.D.2d 481,-P. 2d-(Dec'd April 28, 1966) as

conclusive * * * of whether a judicial hearing is required by our statute in order to fulfill the procedural requirements of due process.

In Dillenburg v. Maxwell, supra, the Attorney General on behalf of the respondent petitioned the Supreme Court of Washington for a rehearing, which was granted by the court, directed solely and completely to the relief granted to Dillenburg, and, in no way complaining of the substantiative rules of law made by that case. The court, in Dillenburg, granted the appellant relief from the judgment and sentence and ordered that he either be retried within 20 days or discharged from custody. The petition of the Attorney General for rehearing requested the court to

reconsider the relief granted to *Dillenburg*. In the argument in support of the petition for rehearing, the Attorney General recommended

that the court remand this matter to the Superior Court of the State of Washington for Jefferson County for a de novo determination of waiver of juvenile jurisdiction consistent with the opinions in Dillenburg and Kent.

(1) Unless it be determined that such de novo retrospective determination would be constitutionally prejudical to petitioner, in which event the conviction would be set aside; or,

(2) In the event the Superior Court finds that the waiver from juvenile court was inappropriate, and that the petitioner should have been dealt with as a juvenile, then the conviction must be set aside.

(3) But, if the waiver is found to have been appropriate when made, the conviction stands, and the court may proceed to hear and determine the unresolved issues in petition-

er's application;

(4) And, if the court finds that number 1 or 2 above are applicable to petitioner's case, then the petitioner should be afforded a new trial within twenty days, or discharged from custody.

Manifestly, Mempa, on his application for a writ of habeas corpus to the Supreme Court of Washington will be entitled to either a new trial or discharge from custody as prescribed in the original Dillenburg decision, or, the relief suggested by the Attorney General in its petition for rehearing quoted from above. As well, this is implicit in the court's order of continuance of the petitioner's hearing on his ap-

lication for a writ of habeas corpus in Cause No. 39048 before the Supreme Court of Washington. (App. p. 34)

A hearing was held before the Supreme Court of Washington on September 27, 1966 on the Attorney General's petition for rehearing, and, it is anticipated that a decision will be forthcoming soon. In the light of these circumstances, it is obvious that the issues presented to the court in Mempa's petition for a writ of certiorari may become moot, and never reached by the court as a result of the disposition of Mempa's application for a writ of habeas corpus to the Supreme Court of Washington.

It is respectfully suggested that the "special and important reasons" for the granting of a writ of certiorari in this case, as required by Supreme Court Rule 19 may well have been dissipated, and become academic, prior to this case ever becoming ripe for decision by the court.

Accordingly, it is respectfully sugested that the court either deny the application for a writ of certiorari in this case, or defer action in granting the petitioner a writ of certiorari until the Supreme Court of Washington has acted upon Mempa's application for a writ of habeas corpus in Cause No. 39048.

B. PROBATION REVOCATION HEARINGS ARE NOT "CRIMINAL PROSECUTIONS" WITHIN THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Since Jaime v. Rhay, 59 Wn.2d 58, 365 P,2d 772 (1961), it has been the law of Washington that probation revocation hearings are not in the nature of a criminal prosecution, and, the ordinary constitutional right to the appointment of counsel as prescribed by the constitution is not applicable.

The Sixth Amendment to the Constitution of the United States defining the rights of accused persons, including the right to counsel, provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have complusory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. (Emphasis ours)

The decision in Jaime v. Rhay, supra, finding that the right to counsel did not apply in probation revocation hearings, was based upon a premise that such a hearing was heither a criminal prosecution, nor a part of the criminal proceedings leading to the conviction of the defendant.

That this is true should be abundantly clear. The question before the court at the time of the hearing upon the motion to revoke the convicted defendant's probation is not directed to the probationer's guilt or

innocence of the underlying crime, but the inquiry goes to the truth of the accusations made of a violation of conditions of probation. The sole subject of inquiry is whether or not the convicted defendant has breached the trust vested in him by the court.

It is forcefully argued that a revocation hearing brings to the fore, vital and significant questions, which may result in the liberty, or imprisonment of the convicted defendant, and, therefore, due process concepts of right to counsel inhere in the proceedings. Such an argument conveniently overlooks the fact, that the resulting sentence on revocation of probation, is not imposed for the violation of probation, — which may not, and often is not, for the commission of a crime — but, the sentence is the punishment for the crime for which the defendant had previously been found guilty.

The source of a convicted defendant's rights in a probation revocation hearing, in this state, arise solely and completely under the probation act (RCW 9.95.200 - 9.95.250) and not from the constitution of this state or of the United States. A probation revocation hearing, not being a "criminal prosecution", decisions of this court concerning the rights of accused persons to have the assistance of counsel at various stages of the criminal proceedings, we submit, are neither applicable nor controlling under these circumstances. Cf. Gideon v. Wainwright, 372 US 335, 83 S.Ct. 792, 9 L.ed. 2d 799 (1963); White v. Maryland, 372 US 59 (1963); Douglas v. California, 372 US 353 (1963).

Also, it must be remembered, that at all times through the granting of probation to the petitioner by the Superior Court, he was represented by an exceptionally able attorney, Mr. Willard Roe, who incidentally is now a Superior Court Judge. At that time, both the petitioner, Mempa, and his attorney, were fully aware of the criminal charges made against him and contained in the Information of which they were supplied copies. At the time of arraignment, with his counsel, Mempa entered a plea of Guilty. He then stood convicted of the crime of TAKING A MOTOR VEHICLE WITHOUT THE PERMIS-SION OF THE OWNER and his conviction rested upon his plea which, in effect, admits the truth of the charges made against him. At the time of the entry of his plea of Guilty, the "criminal prosecution" had come to an end, and no appeal lies from a conviction on a plea of guilty, at least insofar as it goes to the question of guilt or innocence. An appeal may be taken upon matters which are collateral to the conviction and go to the jurisdiction of the Superior Court. However, at the time of the entry of the plea of Guilty, any errors or irregularities which might be appealable should be known by the petitioner's counsel and it must be presumed that if there were such errors or irregularities, and most certainly, if they were of constitutional dimensions, counsel would have so advised petitioner. Following the entry of a plea of Guilty by Mempa, his counsel made a forceful and persuasive argument to the court to grant probation to the petitioner. Following this, the record shows

that the court pronounced sentence and suspended it and granted the petitioner probation for a period of two years upon the condition that he serve thirty days in the county jail.

In the petitioner's case before the Supreme Court of Washington, the court took the position that all things happening following the entry of the petitioner's plea of Guilty did not constitute a part of the "criminal prosecution" and due process considerations were inapplicable. In this respect, the court stated in part as follows:

(Mempa v. Rhay, 68 W.D.2d at p. 874-877) Considering probations as a class of criminal offenders, there is a close analogy between their status and the status of others who have pleaded guilty—or have been convicted—and have been committed to institutional custody, supervision and discipline rather than being granted probation. The administration and control of the activities and conduct of the latter group is of course performed by the prison authorities. It would seem farfetched to suggest that the courts should invade this particular sphere of administrative prerogative and, by judicial fiat, exercise some sort of supervisory authority over existing prison administration, standards and practices.

In terms of further insight into the nature of probation and the administration of the probation system, similar reference and analogy could also be made to the functions of the State Board of Prison Terms and Paroles. The Board fixes the period of confinement and the terms and conditions of parole of those criminal offenders who have been committed to state institutional custody. In addition, the Board has the authority and the responsibility for adminstration of the state probation system. Judicial scrutiny, re-

view, and control over the everyday matters of prison administration and/or parole administration is not only not feasible; it is inadvisable in the light of the particular expertise and training necessary to provide effective institutional custody and parole supervision. Judicial invasion of prison administration inevitably would be most disruptive of prison programing, supervision and discipline. The courts cannot and should not be expected to go into the prisons and decide which prisoners should be treated as "trustees", The point is obvious: prison officials must have effective control and authority in order to maintain an effective prison program. The same can be said of probation programing and administration.

Administrative and field probation officers, as well as prison officials, work diligently to establish workable programs for effective guidance of criminal offenders under their supervision and in their semicustody. Easy access to the courts by probationers to re-evaluate, or challenge, varied aspects of probation programing could well be disastrous in terms of the operation of the Washington state probation system. We are convinced that effective supervision of the probation vehicle by probation officers is a sensitive area, and one not particularly suited to detailed, overall, or even general judicial supervision.

It may seem somewhat more appealing and persuasive to contemplate according full due process rights and privileges to probationers with respect to the termination of their liberty to be at large in their communities than would be the case with respect to the termination of the privileges of prison inmates. However, we are convinced that, while there are some differences in the status and the potential for rehabilitation as between probationers, inmates, and parolees, the problems of administration and the objectives

are basically similar in all three areas. To reiterate: there are no constitutional rights respecting the acquisition of probation status. Logically and rationally, there should be correlatively few, if any, constitutional rights and standards controlling the revocation of probation and matters of administration and supervision of those who have been granted that status.

The above outlined judicial views about the general nature of probation are reinforced by the following language of RCW 9.95.220, which sets out certain legislative policy determinations made with respect to the operation of our probation system. This legislation provides as follows:

Whenever the state parole officer or other officer under whose supervision the probationer has been placed shall have reason to believe such probationer is violating the terms of his probation, or engaging in criminal practices, or is abandoned to improper associates, or living a vicious life, he shall cause the probationer to be brought before the court wherein the probation was granted. For this purpose any peace officer or state parole officer may rearrest any such person without warrant or other process. The court may thereupon in its discretion without notice revoke and terminate such probation. In the event the judgment has been profounced by the court and the execution thereof suspended, the court may revoke such suspension, whereupon the judgment shall be in full force and effect, and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory as the case may be. If the judgment has not been pronounced, the court shall pronounce judgment after such revocation of probation and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory, in accordance with the sentence imposed. (Italics ours.)

It should be noted that the foregoing statute provides that any peace officer or state parole officer may re-arrest a probationer without warrant or other process; furthermore, that the court may thereupon, in its discretion, without notice, revoke and terminate such probation. The statute further provides that suspended or deferred sentences may be summarily revoked, sentence imposed, judgment rendered, and the defendant delivered to the sheriff for transfer to the state penitentiary. While it is true that the revocation of probation does occur in court, and the function is performed by a judge of the superior court. there is nothing in the statute enacted by the legislature to require the observance and application of due process standards as to this facet of the administration of the state probation system. We are not inclined, judicially to impose and to judicially assume responsibility for applying to probation those due process standards which unquestionably are applicable and must be observed in the more orthodox aspects of criminal law administration.

When a convicted person is before the court in the State of Washington, in matters relating to the privilege of his release from custody on probation, any rights that he may then have are to be found in the statutory provisions governing probation, rather than the constitution. The principal statute setting forth rights and procedures in probationary matters is RCW 9.95.220 which provides:

Whenever the state parole officer or other officer under whose supervision the probationer has been placed shall have reason to believe such probationer is violating the terms of his probation. or engaging in criminal practices, or is abandoned to improper associates, or living a vicious life, he shall cause the probationer to be brought before the court wherein the probation was granted. For this purpose any peace officer or state parole officer may rearrest any such person without warrant or other process. The court may, thereupon, in its discretion without notice, revoke and terminate such probation. In the event the judgment has been pronounced by the court and the execution thereof suspended, the court may revoke such suspension, whereupon the judgment shall be in full force and effect. and the defendant shall be delivered to the Sheriff to be transported to the penitentiary or reformatory as the case may be. If the judgment has not been pronounced, the court shall pronounce judgment after such revocation of probation and the defendant shall be delivered to the Sheriff to be transported to the penitentiary or reformatory, in accordance with sentence imposed.

The position taken by the Supreme Court of Washington on the right to counsel of convicted defendants appearing before the courts in probation matters, is neither novel or unique, for a respectable number of jurisdictions have decided this issue in substantially the same way as the Supreme Court of Washington in this case. One of the most recent

of these cases is *Brown v. Warden*, United States Penitentiary, 351 F.2d 564 (CCA 7, 1965). Cert. den. 382 US 1028 in which case the court, in its decision, stated in part, as follows:

An offender's rights under the Federal Probation Act have been construed in Burns v. United States, 287 U.S. 216, 53 S.Ct. 154, 77 L.Ed. 266 (1932), and in Escoe v. Zerbst, 295 U.S. 490, 55 S.Ct. 818, 79 L.Ed. 1566 (1935). The Act is intended to provide a period of grace in order to aid the rehabilitation of a penitent offender. Probation is conferred as a privilege and cannot be demanded as a matter of right. The offender stands convicted and faces punishment. The source of his rights under the Federal Probation Act lies in the legislative mandate, not in the Constitution of the United States.

Congress has declared that a probationer accused of violating his probation "shall be taken before the court for the district having jurisdiction over him." Section 3653, Title 18 U.S.C.A. Although no trial in any strict or formal sense is required, the legislative directive that the accused probationer shall be taken before a court means that—

"there shall be an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper." Escoe v. Zerbst, 295 US, at 493, 55 S.Ct. at 820.

The inquiry of the court at such a hearing is not directed to the probationer's guilt or innocence in the underlying criminal prosecution, but to the truth of the accusation of a violation of probation. Has the probationer abused the privilege of the period of grace extended to him to aid him in rehabilitation?

Liberty on probation is conditioned on the observance of certain conduct. A breach of the required conduct—not necessarily the commission of a crime — constitutes a violation and serves to terminate the privilege of conditional liberty. Although revocation results in the deprivation of the probationer's liberty, the sentence he may be required to serve is the punishment for the crime of which he had previously been found guilty.

Thus it appears that under the Federal Probation Act as construed by the Supreme Court, the source and nature of the offender's rights and the issue before the court on hearing of revocation of probation differ from those on imposition of sentence in a criminal prosecution. It follows that an offender who has already been adjudged guilty and sentenced is not entitled to counsel as a matter of right under the Sixth Amendment of the Constitution of the United States or under Rule 44 of the Federal Rules of Criminal Procedure in the hearing on revocation wherein it is determined whether or not he has forfeited the privilege of conditional liberty. Welsh v. United States, 348 F.2d 885 (6th Cir. 1965); United States v. Huggins, 184 F.2d 866, 868 (7th Cir. 1950); Gillespie v. Hunter, 159 F.2d 410 (10th Cir. 1947); Bennett v. United States, 158 F. 2d 412 (8th Cir. 1946). Decisions concerned with the constitutional right to counsel of an accused at various stages

of criminal prosecutions are not controlling. Cf. Gideon v. Wainwright, 372 US 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963); United States v. Tribote, 297 F.2d 598 (2d Cir. 1961).

Also see Crowe v. United States, 175 F.2d 799 (Ca. 4) Cert. den. 338 US 950, Reh. den. 339 US 916; Richardson v. United States, 199 F.2d 333 (Ca. 10); Shum v. Fogliani, 413 P.2d 495 (Nevada, 1966); People v. Wood, 2 McA 342, 139 N.W.2d 895 (Mich, 1966.)

In the petioner's case, there is no dispute, as to the fact that he was represented by counsel prior to, and at the time of pleading guilty to the charges as contained in the criminal information. Also, his attorney made a forceful presentation to the court to grant the petitioner probation. Thereafter, the court pronounced sentence but suspended all but thirty days of the sentence and granted probation in lieu of a judgment and sentence of confinement in a state correctional institution. We submit, that at that time, the rights of the petitioner were derived from the state probation act (RCW 9.95.200-9.95.250) rather than the constitution, probationary matters not being a part of the "criminal prosecution". The probation act of Washington does not confer upon convicted defendants a right to counsel at the time of the revocation of probation followed by the imposition of sentence and such procedure does not do violence to the provisions of the constitution.

WHEREFORE, the respondent respectfully summits that the application of JERRY DOUGLAS MEMPA

for a writ of certiorari to review the decision of the Supreme Court of the State of Washington should be denied.

Respectfully submitted,

JOHN J. O'CONNELL Attorney General of the State of Washington, STEPHEN C. WAY

Assistant Attorney General.

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Application for a Writ of Habeas Corpus of JERRY DOUGLAS MEMPA, Petitioner,

VS.

B. J. RHAY, as Superintendent of the Washington State Penitentiary at Walla Walla, Washington,

Respondent.

No. 39048

ORDER OF CONTINUANCE

The petition of Jerry Douglas Mempa for a writ of habeas corpus having come on regularly for hearing before Department I of this Court on October 7, 1966 the petitioner being represented by Carl Maxey, and the respondent being represented by Lee D. Rickabaugh, Assistant Attorney General; and the Court having read and considered the petition and the respondent's return and answer, and it appearing that the application for a writ of habeas corpus and the return and answer raise the following issue:

Whether or not the petitioner was properly transferred from juvenile status for trial under the provisions of the criminal code, and, if not, what relief should be granted the petitioner.

It further appearing that the opinion in Dillenburg v. Maxwell, 68 W.D 2d 481, 413 Pac. 2d 940,

controls a determination of this case, but that the opinion in the Dillenburg case is not yet final, a petition for rehearing having been argued before the En Banc Court on September 27, 1966, and not yet determined; Now, therefore, it is hereby

ORDERED that the hearing in the above entitled proceeding is continued to a date to be determined after the final disposition of *Dillenburg v. Maxwell*, supra; and

It is Further Ordered that both petitioner and respondent shall be afforded the opportunity to file amended briefs prior to the continued hearing and to present oral argument on the issue of the applicability of the final decision in *Dillenburg v. Maxwell*, supra, to the disposition of this proceeding.

Dated at Olympia, Washington, this 20th day of October, 1966.

/s/ Hugh J. Rosellini Chief Justice.

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON,

Plaintiff

No. 16277

JERRY D. MEMPA.

Defendant.

TRANSCRIPT OF PROCEEDINGS
June 17, 1959

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR COUNTY OF SPOKANE

STATE OF WASHINGTON,

Plaintiff,

No. 16277

JERRY D. MEMPA,

Defendant.

TRANSCRIPT OF PROCEEDINGS
June 17, 1959

BE IT REMEMBERED:

That the above entitled cause came on for hearing on the 17th day of June, 1959, before the Honorable Louis F. Bunge, Judge of the Superior Court of the State of Washington, in and for the County of Spokane, Washington; the plaintiff being represented by Howard A. Anderson, Deputy Prosecuting Attorney for Spokane County, Washington; the de-

fendant being personally present and being represented by Willard J. Roe, his attorney; and both sides having announced that they were ready, the following proceedings were had, to wit:

MR. ANDERSON: If the Court please, this is a matter, State of Washington v. Jerry D. Mempa, Superior Court No. 16277. The defendant is present in court at this time. He is represented by his attorney, Mr. Willard Roe, and we are here for the purpose of an arraignment.

THE COURT: Is that correct, Mr. Roe? You are here for the purpose of arraignment?

MR. ROE: Yes, your Honor.

Mr. Anderson: Is your true and correct name, Jerry D. Mempa?

MR. MEMPA: Yes.

Mr. ANDERSON: Mr. Roe, you have received a copy of this information?

MR. ROE: I have.

MR. ANDERSON: Jerry D. Mempa, has the Deputy Sheriff read the warrant to you?

MR. MEMPA: Yes.

MR. ANDERSON: Jerry D. Mempa, you are charged by complaint filed in this court with the crime of violating Section 9.54.020 of the Revised Gode of Washington, commonly known as "Joy-riding," the charging part of the information reading as follows: That you, "Jerry D. Mempa, in the County of Spokane, State of Washington, on or about the 25th day of April, 1959, then and there being, did then and there willfully, unlawfully, and feloniously, without the permission of the owner of person entitled

to possession thereof, intentionally take and drive away a motor vehicle, to wit: a 1956 Chevrolet automobile, Washington License No. CBS-454, the property of Bert Sampson."

THE COURT: You have 24 hours within which to enter a plea. Do you want to plead now or wait

the 24 hours?

MR. MEMPA: Plead now.

THE COURT: How old are you, Jerry?

MR. MEMPA: Seventeen.

THE COURT: When will you be eighteen?

MR. MEMPA: Next May.

MR. ROE: May 14th.

THE COURT: You have just turned seventeen,

then?

MR. MEMPA: Yes.

THE COURT: Where is your home?

Mr. Mempa: Spokane.

THE COURT: Are your parents here in court?

MR. MEMPA: Yes

THE COURT: What is your plea to the crime of joy-riding as just read to you by the deputy sheriff — guilty or not guilty?

MR. MEMPA: It's guilty.

THE COURT: All right. You may be seated.

MR. ANDERSON: If the Court please, the record for the defendant, Jerry Mempa, as a juvenile, in accordance with what Jerry Mempa has stated to me, on December 19, 1955, at a time when he was thirteen years of age, was before the juvenile officers for burglary. At that time he was detained one week in the juvenile home, and placed on an unofficial probation.

When he was 14 years of age, on April 9, 1956, he was before the juvenile court for a burglary

and malicious vandalism, and at that time, on April 13, 1956, he was placed in the State Training School at the Green Hill Academy, in Chehalis, Washington. He remained there until December 24, 1957, when he was released to his parents.

On February 13, 1958, he was found with wires in his possession that were commonly used to "hot-wire" automobiles. He was placed in the detention home because of this, and on that evening or the following day, there was an attempted break-out from the detention home. Jerry Mempa was one of the parties; however, he states it wasn't his idea or plan, but he had agreed to participate in it. As a result of this conduct, on February 14, 1958, he was returned to the Green Hill Academy in Chehalis, Washington.

On March 24, 1958, because of a riot that had occurred at the Academy, the school authorities or officers refused to keep Jerry Mempa there any longer, and he was returned to Spokane County. At that time, in March of 1958, he was sent to Eastern State Hospital on petition, for a psychopathic delinquent. He was transferred to the Diagnostic Center at Fort Worden; Washington, where he remained approximately ten days, and then he was transferred to Western State Hospital. The authorities at Western State Hospital were of the opinion that he was a psychopathic delinquent, and he was returned to Spokane County for the authorities to take what action they felt was necessary.

A petition was then filed placing him for observation again at Eastern State Hospital as a pos-

sible psychopathic delinquent. The staff at Eastern State Hospital felt that he was not a psychopathic delinquent, and this petition was then dismissed and Jerry Mempa was returned to his home in Spokane.

As he stated, he is seventeen years of age. He was born in Butte, Montana, on May 14, 1942. He has a fourteen-year-old brother who is a student at North Central High School. Jerry Mempa was raised by his grandparents until 1952, at which time he left. He then lived with his mother and his stepfather; they reside at 2518 East Trent. His stepfather is a barber. As far as his education is concerned, he didn't quite finish the eighth grade.

As to the circumstances of this particular case, your Honor, on the evening of April 24, 1958, David Grant and Jerry Mempa were together. David Grant is also a juvenile boy - he has not reached eighteen. The two of them went to Al's Auto Sales, at East 3108 Sprague. Now, the stories are a little conflicting as to just what happened, and David Grant states that Jerry Mempa had a ring of keys, and that he used one of these keys in a 1953 Chevrolet, and that he drove the Chevrolet away and David Grant rode in the car with the defendant. Jerry Mempa states that David Grant was the person that had the ring of keys, and that David Grant drove this car away, and that Jerry Mempa then got in. At any rate, the two boys admit that they both drove this 1953 Chevrolet, they both rode in it, it was taken without permission. During the course of the evening, at approximately 11:00 p.m., they stopped by the home of Charles

Dickerson, who lives at East 1904 Hartson, and Charles Dickerson, David Grant and Jerry Mempa then drove the car around the southeast section of town until it finally ran out of gas in the 1900 block on East 6th.

At that time the car was abandoned and the hub caps and fender skirts were taken from this car and placed in the garage of a relative of Charles Dickerson.

The following evening — now, this is the charge that has been filed against the defendant — on April the 25th of this year, Jerry Mempa and David Grant both rode and drove the 1956 Chevrolet that was taken from the garage at South 309 Haven. This is a private garage where the car was taken. Again the stories are a little bit in conflict. Jerry Mempa states that David Grant came to Mempa's home in this car and stated that it was a car that belonged to a relative of his, and that they then drove in it, Jerry Mempa had not yet driven this car and later on found out that the car had been taken without permission because when Grant would see a policeman or an officer, he would immediately turn and go on some side street. David Grant states that Jerry Mempa - again using this ring of keys, that he had went into the garage at this address and the key fit this 1956 Chevrolet and that they then drove it. This car was driven during the evening of April 25th of this year by both boys, Jerry Mempa and David Grant. It was then parked near a park. The following day, on April 26th, both boys, Jerry Mempa and David Grant, returned to the car and they drove the car that day until the transmission on this 1956 Chevrolet

finally gave out. Jerry Mempa states that he drove it for about two miles in reverse, and then

parked it.

The people at South 308 Haven informed the police that they thought a neighbor boy might have had something to do with that, and that neighbor was David Grant. He was picked up by the police department, questioned, and he admitted everything that occurred pertaining to these cars. He was sent by the juvenile court to the Green Hill Academy at Chehalis, Washington.

At approximately 7:00 p.m. April 28th of this year Jerry Mempa, the defendant, was picked up; he was placed in the juvenile detention home. His officer, Mr. Jim Davis, was talking to him on April 29th of this year. As Mr. Davis was taking Jerry Mempa back to where he was being detained, the defendant broke away from the officer and ran out of the building and fled that particular area. The juvenile court remanded this particular case to the prosecutor's office on May 1st of this year, and then on May the 18th of this year, Jerry Mempa, accompanied by his stepfather, Mr. Dickerson, came in on their own to the Spokane County Sheriff's office and he turned himself in at that time. He has been in custody ever since.

THE COURT: Where at?

MR. ANDERSON: In the Spokane County jail, your Honor.

THE COURT: Mr. Roe?

MR. ROE: I think your Honor may have had some previous acquaintance with this case.

THE COURT: Quite a little.

MR. ROE: I was appointed to defend this man by Judge Kelly after he had been in jail some time, and statements had been taken from him and also the other participants, and it's clear beyond all reasonable doubt, as far as I'm concerned, that this crime was committed and this man is guilty. It's a sorry recital, obviously, of this boy's previous three or four years. The only one bright light, and one that I think should commend itself to the Court, is the fact that he gave himself up voluntarily on May 18th, after he successfully made an escape from the juvenile, and he has been in jail now for a month today.

He is a product of a broken home, he has been knocked about from early infancy, he hasn't even finished the eighth grade. At the time he first got into trouble—I believe this is correct, though Mr. Anderson can correct me if it's wrong—it was his participation in the burglary of a surplus store. The others were given probation and I believe one left the state, but only Jerry was sent to Chehalis, where he served

eighteen months or so.

He has been pushed around even by the state, from one institution to another, from Chehalis to Western State to Eastern State; he has been knocked about by them. He hasn't been given a real break by the state yet. Even in this last deal, which is the subject of this charge today, your Honor, I believe from my limited information that of the three boys, David Grant, Charles Dickerson and Jerry Mempa, the only one before the Superior Court is Jerry Mempa. I believe that Charles Dickerson—who is no relation to the stepfather, I might add—was given proba-

tion. I believe that David Grant was sent back to Chehalis.

Now I know this poses a hard task and a difficult task for the court. I suppose an easy way would be to send him to Monroe. The fact that he is here in Superior Court indicates the gravity of the situation, but nevertheless this boy is not eighteen. He is just barely seventeen; he was sixteen when this occurred. If there is ever a chance to redeem him for society, or to make him indebted to society, it is now. This is the very last opportunity, it would appear to me. I don't know-I of course don't know the causes. and I doubt if anyone knows certainly the causes. why this boy is in trouble. His mother is here. very concerned, and his stepfather took time off from work to be here. He has another brother. age fourteen, who is a student at North Central High School and is making average grades, and so the home life must be acceptable enough. Not presuming at all upon the Court, but I have attempted to see what we could find for him in the way of work, if he got out of jail or if he was given some sentence in the county jail. It is difficult to find a job for a boy of this record and also his education. I have talked to a Richard Montoya, who runs the Dishman Body and Fender Shop and does tire recapping. He has indicated he would be interested in putting the boy to work. He can't promise a job right now, but he will later, and he can't pay much, but he could pay something, to give him something to do. He has never had a real job.

I have also talked to Mr. Paul Cooney, the attorney who previously represented Mr. Mempa.

Mr. Cooney is familiar with this, and of course he has tried to get a job for the boy, but it didn't pan out, but he has conferred with some of his clients in a light manufacturing enterprise, and they would be willing to take a chance on the boy. It depends on orders given, but there is a possibility around August 1st that there might be a job available there.

I think the Court should look at the case in this light, particularly since you have a previous acquaintance with this matter. The role of a judge in assessing the punishment in a trial, of course, has many factors. One is, of course, the satisfaction of the demands of the state. He has already served more time in dentention than many men who have committed much worse crimes than this. If he goes, I suppose that the chip on the shoulder that some of them come out with will be further aggravated. The only hope that I see is to make him realize that society is giving him a break, and that he is indebted to the Court or to society when they did not take advantage of him when they could, and that is by possibly giving him a chance now, so that he will have an understanding and a need to repay society, and possibly with that approach this boy can be saved. Certainly I think this is probably the last time. He has served a month in the county jail. An appropriate term in the county jail, if there was further work which was provided, I think could satisfy the demands of the state and at the same time preserve this young boy, still in his tender youth, for society. I ask that the Court look upon it in that light.

THE COURT: Is there anything you want to say, Mr. Anderson?

Mr. ANDERSON: No. your Honor.

THE COURT: Well, gentlemen, the talk that you have made here, Mr. Roe, is almost similar to the one that the other counsel that you mentioned, Mr. Cooney, made. Every lawyer that has had any touch with this case has been convinced, honestly, as I think you are, that something went wrong with this boy somewhere, that he never recognized any of the responsibilities of citizenship. I have been impressed, the previous times that he has appeared before me when I was sitting in juvenile, that his father-in-law. or his stepfather was very kindly disposed to him. I think his parents both wanted this boy to get along, and were willing to do anything they could do, but apparently what they could do has been very short of what was required in his case. He has a genius for stealing cars. He will come up with a mechanism that he can cross-wire these cars, and he has a positive genius for that. Then he seems to have a genius for getting everybody that has tried to help him charged with the duty of taking care of him and getting entrapped with him. I don't know why -I haven't been in these places-but they don't want him at Green Hill, they don't want him at Medical Lake, and they don't want him at Western State. I don't know why, but it's true. I aminclined to agree with you, Mr. Roe, that this is a crossroads for this boy, this is a critical period in his life, but what I am disturbed by is that we, in juvenile, have given his parents and everybody else that could be reached a chance to do something with him, and everybody has failed.

and society keeps on suffering from his misdeeds. I venture to say that when he is out of the institution again, it won't take him ten days to get back in. They will pick him up somewhere that's what concerns me. Have you any program or anything in mind? Have you tried to impress him with the necessity of abiding by the laws of society, Mr. Roe—that would help us in any way that would offer some hope to get him to realize his position?

MR. ROE: I have, your Honor, and I have told

him that he can't beat society.

THE COURT: Have you convinced him?

MR. ROE: Well, he appears convinced to me, in jail, but I can't guarantee that my suggestion will stick. It is not pleasant in the county jail. I think—now is the first time he has been in a real jail, and possibly leaving him there for a few months—that's twice as hard as serving any place else. Maybe we can have some job available, maybe, during the summer, with Mr. Cooney or this tire recap under strict supervision, with a good dose of county jail time. Your Honor, I think it is the only hope. If he is ordered to the reformatory, I am afraid he is gone. Sixteen when this happened—or this happened before the age of sixteen—he is not too old to be turned.

THE COURT: Mr. Davis has a way with boys that is quite effective, and he did everything in the world that he could with this young man, and there just seems no influence of any kind that could reach him that I know of. After serving three years, from 1935 to 1938, in the position of Chairman of the Parole Board, I am

convinced of something that an old parole officer of many years of experience told me, that the hardest time, as far as pure punishment is concerned, that a prisoner serves is either in the county jail or a penitentiary in the first thirty days that he is there. After that time, he becomes case-hardened, he doesn't have the same reaction to his punishment and there's nothing gained except as far as society is concerned. But he bothers me very much. For that time he was in, he was falsifying with respect to how he got the new mechanism that he had, and he seems to be able to draw the boys to him, which is distressing, in these escapes. Now I realize there is a sort of code among these delinquents where they say they can steal five cars before anything serious will happen to them, but most of those boys, we can send them over to the training school and they come back and don't get into any more trouble, and this boy does have trouble. I have had letters from psychiatrists at our institutions; they have examined him; they can't convince themselves that he is insane; he is just apparently delinquent, and that's all.

You may stand up. Is there anything you want to say on your own behalf before the judgment of the Court is pronounced in this case?

MR. MEMPA: No sir.

THE COURT: Why is it, Jerry, that you won't

listen to reason about your troubles?

MR. MEMPA: I listen.

THE COURT: We can't hear you.

MR. MEMPA: I said I listen.

THE COURT: Well, you never listened to your

stepfather, did you?

MR. MEMPA: No.

THE COURT: He always treated you all right,

didn't he?

MR. MEMPA: Yes.

THE COURT: Your mother provided a home for you, you had an opportunity to go to school, but you missed it every time, isn't that right?

MR. MEMPA: Yes sir.

THE COURT: And your mother has always been kind to you, hasn't she?

Mr. Mempa: Yes.

THE COURT: They don't want you to do this sort of thing. Now, you made some promises to Mr. Cooney, your other lawyer, didn't you? You told him you were going to stay out of troubledidn't you say that to him?

MR. MEMPA: Yes.

THE COURT: What hope have I, what assurance have I to turn you loose on society once again? MR. MEMPA: Well, I think I would make it this time.

THE COURT: You think you would make good?

MR. MEMPA: Yes.

THE COURT: How far did you get in school?

MR. MEMPA: I didn't get quite through the eighth grade.

THE COURT: What was the reason? Were you getting along all right in the eighth grade when you were pulled in the last time?

MR. MEMPA: Yes.

THE COURT: Why did you run from Mr. Davis

over at the juvenile?

MR. MEMPA: Well, he said he was going to remand me to Superior Court, and told me the sentence would probably be ten years, I would probably go to Monroe.

THE COURT: What justification would I have now to let you go after you have served another thirty days in the county jail? Do you think you have learned something out of this?

MR. MEMPA: Yes.

THE COURT: Do you think you can resist from now on, if you served another thirty days down there, could you resist and steer another course now?

MR. MEMPA: Yes.

THE COURT: You don't say that very convinc-

ingly, young man.
MR. MEMPA: I could.

THE COURT: Anything else you want to say?

MR. MEMPA: No.

THE COURT: Very well. It is the further judgment of the Court that you be confined in the institution for a maximum period of ten years. Now, Tam going to suspend every bit of that except thirty days. I want you to serve thirty days actually on this. I want to point out to you now that when you are released you are going to be under observation not of the juvenile officers, but of the state parole officers. Those men know their business. They are kindly disposed. They will be there for the purpose of seeing that you don't get back here again. Take advantage of this, or you are going to be back here. You are absolutely on your own now. Mr. Roe can't help you, and no one else can help you, and if you steal a car, you are going to Monroe and you are going to stay there.

I would think that you would realize that this is a real opportunity, and that you would behave

yourself from now on.

MR. ANDERSON: Your Honor, actually what you are doing is placing the defendant on probation?

THE COURT: Yes, that is the effect of it. Except that he has served 15 days, I could make it for a period of two years. I should have done that. Mr. Roe, will you undertake to tell him once more for his own behalf that it is up to him from here on, now, that he become a good citizen.

MR. ROE: Yes sir, I will.

THE COURT: This is a probationary order, Mr. Roe, with the exception of his serving thirty days. I think it's regrettable that he has not finished his schooling, at least his eighth grade, and if there's any hope of getting him out here to the Industrial School, I would like to see him go. I have signed the order.

REPORTER'S CERTIFICATE STATE OF WASHINGTON COUNTY OF SPOKANE

I, Margaret Lehan, do hereby certify:

That I was the acting Court Reporter of the Superior Court of the State of Washington, in and for County of Spokane, on June 17, 1959;

That as such reporter I reported in shorthand pages Nos. 1 to 16, inclusive, in the above entitled cause; that the above and foregoing is a full, true and correct transcript of the stenographic notes taken by me of the proceedings had in the above matter on the above date, and that the same contains all objections made and exceptions taken therein.

/s/ MARGARET LEHAN

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Application for a Writ of Habeas Corpus of JERRY DOUGLAS MEMPA,

Petitioner.

V.

No. 39048

B. J. RHAY, as Superintendent of the Washington State Penitentiary at Walla Walla, Washington, Respondent.

STATE OF WASHINGTON, SS.

I, WILLIAM M. LOWRY, Clerk of the Supreme Court of the State of Washington, do hereby certify that the attached and foregoing is a full, true and correct copy of the Order of Continuance, filed October 21, 1966; Transcript of Proceedings, State vs. Mempa, filed September 27, 1966, and the whole thereof, as they now appear of record and on file in my office.

[SEAL]

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 15th day of November, 1966.

WILLIAM M. LOWRY Clerk of the Supreme Court, State of Washington. Office-Supreme Court, U.S. FILED

DEC 5 1966

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 1

JERRY DOUGLAS MEMPA,

Petitioner,

78

B. J. RHAY, Superintendent, Washington State Penitentiary,

Respondent.

REPLY BRIEF OF PETITIONER

Evan L. Schwab 1405, 1411 Fourth Avenue Seattle, Washington 98101 Donald A. Schmechel 1405, 1411 Fourth Avenue Seattle, Washington 98101 Michael H. Rosen
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ATTORNEYS FOR PETITIONER

IN THE

SUPREME COURT OF THE UNITED OCTOBER TERM,

No. 424

JERRY DOUGLAS MEMPA,

Petitioner,

B. J. RHAY, Superintendent, Washington State Penitentiary,

Respondent.

REPLY BRIEF OF PETITIONER

petition for writ of certiorari, the respondent suggests that the should be denied, or action deferred, because the case case can be heard by the Court. On pages 9/through 12 of his brief in opposition to the fact remains, however, that this case is not presently moot, might become moot before this it is ripe for decision. petition

lief, however, are purely problematical at this point, and should state effective re--- is presently seeking release through normal Admittedly, petitioner -- an inmate of the Washington not disqualify him from obtaining review by this Court of His chances of obtaining stantial constitutional questions he has presented. habeas corpus procedures. Penitentiary

To aid the Court in understanding the nature of the habeas corpus relief sought by petitioner, and the procedural posture attempt to explain will case, petitioner

diction over a minor and remands him to the prosecuting authorities 481 -- P.2d --, holding that a judicial hearing is constitutionally required whenever a juvenile court relinquishes exclusive juris-On April 28, 1966, the Washington State Supreme Court ren-68 Wash. Dec. 2d ordered that he be retried within twenty days or discharged the appellant and the the judgment and sentence, In Dillenburg, dered an opinion in Dillenburg v. Maxwell, treatment as an adult. granted relief from custody. for

sought further habeas corpus relief after the Dillenburg decision relinquished jurisdiction over him, he , Because petitioner Mempa was not given any sort of hearing after the decision below in the present for certiorari in this Court. the juvenile court came down, and filed also

on motion of the respondent in this rehearing was granted in the Dillenburg case, pursuant to Court rules on appeal, Rule 50 of the Washington Supreme follows: however, alia, as Subsequently, provides, inter

shall suspend the decicause is finally deter after an the court as hereinafter case may, appealed case may, filed, present to petition for rehearing shall sof the court until the cause i for rehearing. time the manner and to an been opinion has party

respondent points out on pages 10 and 11 of his brief in opposition, he requested rehearing primarily on the issue of the retrial or discharg relief granted in the Dillenburg case,

The respondent requested the relief explained Under Rule 50, however, the entire Dillenburg decision was suspended of whether waiver of juvenile jurisdiction was proper rehearing was granted, and the case was reargued on the merits A de novo determination If, in the new hearing, it is found that waiver was not The essence of his request adult, must be retried or discharged from custody. By granting juvenile, who is by then usually an the Washington Supreme Court type of relief If waiver appropriate when made, the conviction stands. the is contained in subparagraphs (2) and (3). on page 11 of his brief in this Court. to reconsider rehearing in the Dillenburg case, the indicated its willingness September 27, 1966. appropriate when made, granted in such cases. should be made initially.

Petitioner's case will probably be controlled by the new decision in Dillenburg -- assuming it is retroactive continued on October 7, 1966. cordingly his case was

respondent's brief illustrates petitioner's prior criminal record. petitioner can expect a de novo determination of whether juvenile and only if Dillenburg applies to his case, receive when Dilles Appendix B in waived. In essence, Consequently the petitioner does not anticipate a finding that If respondent's position there is accepted, he expects very little from his present petition for habeas Washington Supreme Court adheres to its original decision, corpus before the Washington Supreme Court. Only if the will the petitioner have achieved effective relief court jurisdiction was properly waived in 1959. What relief, then, is petitioner apt to juvenile court jurisdiction was improperly retrial or discharge, burg is decided?

On the other hand, if review is granted now, and if the obtain decision below is reversed, petitioner will

and sen--- on the issue of probation revocation tencing. This is effective relief. counsel

this Court should reject respondent's invitation to The case is not moot and probable mootness will naturally be presented to the Court does become moot. the petitioner himself if and when the case deny certiorari because of what might happen. In summary,

The Seventh his right It did not involve the issue States Penitentiary, Turning to the merits, respondent's brief is surprisingly volved revocation of probation and execution of an already im-351 F.2d 564, discussed on pages 21-23 of respondent's brief, sentencing following probation revocation. silent on the strongest portion of petitioner's case -sentencing after probation was revoked. Circuit opinion in Brown v. Warden, United -- sentence. suspended presented here -counsel at posed -- but

certiorari in Walkling v. Rhay, No. 734, a case presenting identisentencing. respondent's inconsistent and shifting position this respondent asked the Washington Court to over-As revealed by the record and petition for the Washington Court that is constitutionally required at cal issues, respondent conceded to appointment of counsel Furthermore, should be noted. In Walkling , rule Mempa

The petition for writ of certiorari should be granted.

Respectfully submitted.

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ATTORNEYS FOR PETITIONER

November 30,1966

IN THE

Office Supreme Court, U.S. FILED

COURT OF THE UNITED STATES SUPREME

1966 OCTOBER TERM,

LIDHN F. DAVIS, CLERK OCT 31 1960

WILLIAM EARL WALKLING,

Petitioner

VS.

Washington B. J. RHAY, Superintendent, State Penitentiary,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF THE STATE OF WASHINGTON SUPREME

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ATTORNEYS FOR PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

2

WILLIAM EARL WALKLING,

Petitioner,

Vs.

B. J. RHAY, Superintendent, Washington State Penitentiary,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

William Earl Walkling prays that a Writ of Certiorari issue of the Supreme Court of the State of Washingentered in the above-entitled case on October 18, 1966. review the order

OPINION BÉLOW

The order of the Washington State Supreme Court, reprohereto, infra, is not yet reported Appendix A duced in

· JURISDICTION

The order of the Court below was filed on October 18, 1966, The jurisdiction of Appendix A, infra, p. A-2). (T. 1)

refers to the record of the proceedings in the court below, entitled "Transcript on Petition for "Certiorari" on its T.L. 1/which

is invoked under 28 U.S.C., § 1257(3), because rights Constitution of the United States. claimed under the Court

QUESTIONS PRESENTED

- Does the Fourteenth Amendment confer a right to counsel during a state court probation revocation proceeding?
- to counsel a right court state Amendment confer stage of and judgment Does the Fourteenth at the sentencing proceeding?
- of If such a right to counsel exists, and in the absence a defendant unable to be appointed for waiver, must counsel counsel? ploy

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

provisions involved are the Sixth Amend The constitutional ment,

he accused the Assistance the "In all criminal prosecutions, t shall enjoy the right... to have of Counsel for his defence,"

the Fourteenth Amendment of the Constitution United States, and Section 1 of the

digtion the equal protection of the laws." any liberty, or property, without due nor deny to any person within its shall any of life, liberty,

Code statutory provisions involved are sections 9.95.200, the Revised (g) to D-3 S 3006A 9.95.240 and 10.40.175 of in Appendix D, infra, pp. D-1 18 U.S.C. 552, of Washington, and 78 Stat. 9.95.220, are reproduced 9.95.210,

STATEMENT OF THE CASE

information charged the petitioner was 1962, On October 11,

burglary in the second degree on or about September 19, 1962 (T. 56) filed in the Superior Court of the State of Washington for Thurston On October 29, 1962, the petitioner was brought before the Superior The Court entered an Order deferring condition of such deferral, required petitioner to serve 90 days arraignment upon the information, County in Cause No. C-2941, with having committed the crime of The petitioner thereupon entered a plea of guilty to the crime at which time he was accompanied by his attorney, W. N. Beal. October 29, 1962, and granted the petitioner probation under supervision of the Board of Prison Terms and Paroles and, as the imposition of sentence for a period of three years from in jail and make restitution (T. 57). Court for Thurston County for charged in the information.

2, 1963, on the basis of the report that the petithe Thurston County Superior Court ordered the issuance of a bench tioner had violated the terms of his probation, his apprehension (T. 51).

the Sheriff of Lewis County, Washington, and an information was thereafter filed in Lewis County charging the petitioner with forgery in On February 24, 1964, petitioner was arrested by first degree and grand larceny (T. 52).

On April 16, 1964, before further proceedings were had in County, the petitioner was transported from Lewis County the May 2, 40 to the Thurston County jail pursuant warrant (T. 52.).

cuting Attorney for an Order revoking the Order deferring sentence On May 12, 1964, petitioner was brought before the Thurston continuance County Superior Court for hearing on the petition of the Prose-Petitioner then requested and granting probation.

order to secure the services of an attorney, and the matter (T.54). was continued to May 18, 1964, at 9:00 A.M.

(T. 54). of counsel thought an attorney had been hired by his family to represent him represented defendants of a right to counsel in such proceedings The court below assumed for purposes of decision that follows, and it was not Judge Clifford's practice to advise un-The Court held the matter in abeyance until 9:15 A.M., but pro-The petitioner therefore appeared without counsel, although he cases that there was no constitutional right to counsel in pro for hearing at which time the petitioner was present in Court Raymond Clifford, now deceased, took the position in all such bation revocation proceedings or during the sentencing which the Court that ceeded then because no one had appeared for the petitioner a right to the appointment On May 18, 1964, at 9:00 A.M., the matter was E) of counsel The petitioner advised assistance advised of at public expense (T. 2). requested the without an attorney. petitioner was not

petitioner was sentenced to a term of confinement of not more than the defendant in Open Court, and a certified copy was served upon and probation 40 fourteen separate counts of grand larceny filed against fifteen years upon his previous plea of guilty to the crime of testified in regard to the fourteen separate counts of forgery Clare Murray, a probation parole officer was sworn and to October 29, 1962. The Court should be revoked, whereupon an Order was so entered, and of sentence was Order granting deferral of sentence The petition to set aside deferral (T. 55) degree subsequent second the cluded that the the petitioner and the

his request for appointment of counsel. The petition for writ of alleging that the judgment and sentence of May 18, 1962, was void habeas corpus specifically relied upon the Sixth and Fourteenth habeas corpus (T. 62) with the Washington State Supreme Court, during the pro-1966, petitioner filed a petition for writ of at the time of sentencing, amendments to the Constitution of the United States. counsel because he had not been represented by bation revocation hearing, nor In June,

When the case was submitted to the court below, the respondent of sentencing approach to probation revocation proceedings (T. 20). As to the which is reproduced here in Appendices B and C. The respondent (T. 11), and respondent attacked Mempa's "quasi-administrative" conceded a major portion of the petitioner's case. The briefs Метра Rhay October Term 1966, 27). On page 21 (T.26) overruled, and that asked the court to "reconsider and re-evaluate" Mempa v. and argument were directed to the continued vitality of counsel at the time Dec. 2d (Advance Sheets) 871, which is pending on certiorari as No. 424, agreed that Mempa should be E) was entitled to relief appoint respondent said: court's failure to 68 Wash. petitioner his brief, respondent trial

is a constitutional state by the basion. The right hearing upon the entry of judgment and sence are clearly a part of the 'criminal secution' as contemplated by the framers the Constitution of this state (Amendment and are within the provisions of the the Amendment to the Constitution of the that entry and follows by reason of the fact that it is the proceedings and convicted defendant who comes before constitution. take of this submit 4 is not within The right of the proceedings is and it is not within legislature respectfully people state stage' of United States. stage of the pa in the prosecution and document, critical "We the right, vested Sixth OF

unaccompanied by counsel without having competently and intelligently waived the right to counsel is denied 'due process of law', and furthermore, is denied equal protection of the laws."

subra Rhay, adhered to Mempa phrasing the issue of the case as: court below, however, The

"Whether or not the petitioner's constitutional rights were violated upon the grounds that the superior court of the state of Washington in and for the county of Thurston in Cause No. C-2941 prior to the hearing on the motion to revoke the petitioner's probation and impose sentence upon his conviction of the crime of Burglary in the Second Degree, did not advise him of a right to be provided with an attorney to give aid and assistance to the petitioner to be provided for atpublic expense,"

and stating its reason as follows (T. 2,):

"The application of WILLIAM EARL WALKLING for writ of habeas corpus is controlled by this court's recent decision in Mempa v. Rhay, 68 W.D.2d 871 and his constitutional rights were not violated on the grounds alleged for the reasons assigned in the decision by this court in Mempa v. Rhay, supra."

1966, and dealt decision was rendered on June 23, issue: The Mempa with this

status was revoked, (b) the deferral of sentence was vacated, and (c) its imposition took effect forthwith. Thus, the problem presented to us for decision is whether probationer Mempa was entitled to counsel as a matter of constitutional right in relation to any one or all of the foregoing aspects of administration of the state probation system." (Appendix B, infra, of habeas corpus may be concisely described as follows: Jerry D. Mempa was not represented by counsel at the peremptory hearing in the Spokane Superior Court when (a) his probation status was revoked, (b) the deferral of senten was vacated, and (c) its imposition. tional right in relation the foregoing aspects of a state probation system." opinion is well summarized in this excerpt (Appendix B, B-12): The Mempa å,

"We have previously held that there are

sition of probation status. And it is furthermore our reasoning that there are no constitutional rights involved in the termination or
revocation of probationary status, or in respect
of the concomitant operations of the superior
courts involving imposition of either (1)
suspended or (2) deferred sentences. The function
involved, in terms of definitive action, is
essentially quasi-administrative on plenary in
nature. The operations are essentially no The function state those performed administratively bard of Prisor Terms and Paroles on authorities in administering orner phases of penal administration in the of Washington." the prison aut nature. The of by the or by to other p

then specifically rejected the authority of Gideon 372 U.S. 335 (1963), and Escoe vs. Zerbst, 295 U.S. (Appendix B, infra, p. B-15) 490 (1935), concluding as follows Court Wainwright, The

"No appeal, or a petition." court where corpus, will be successful in this court where the grobationer was accorded his constitutional due process rights accorded his constitutional due process rights accorded his constitutional due process rights."

REASONS FOR GRANTING THE WRIT

right issues as significant and as demanding of resolution by Douglas v. 372 424, presents as the issues involved in Gideon v. Wainwright, and Miranda v. Arizona, (1964); supra, No. 478 378 U.S. Rhay, Illinois, 372 U.S. 353 (4963); case, like Mempa v. > (1963); Escobedo counsel California, This Court 335

an anachronistic reliance upon the ancient concepts grace, " the court below right to counagainst petireputation, his future record, his sentence was a constitutional sense at which imposed upon a criminal charge. The proceeding held that petitioner did not have a constitutional hearing for the first time, "the chancellor's into a significant in sel when he was peremptorily hailed appellate remedies, and when, his liberty, his of "right-privilege" and critically By as stakes were (1966) tioner was

Maryland, 373 U.S. 59 (1963), and 368 U.S. 52 (1961). the proceeding in White v. Hamilton v. Alabama,

Advocate and the Expert-Counsel in the Peno-Correctional Process Recent decisions of this Court have established the right stages of proceedings against an accused Unfortunately one gap remains -- the area Professor Sanford case involves the right to counsel during one phase of Rev. 803 (1961) (hereinafter cited "Kadish, Kadish has labeled "Peno-Correctional" in his article, gap -- proceedings after conviction following a trial guilty, and before judgment and sentence are entered. to counsel at various

Consequently, certiogari should be granted 424 is subsequently 424 mentions that the petitioner there is presently the issue is thereby pre-Like No. 424 which is pending on certiorari, this case, in essence, seeks review of the Mempa decision. Footnote 10 served for this court to consider even if No. in No. 424 --disposed of on other grounds. in this case as well as seeking other relief. petition No.

which will pose right to legal June 13, 1966, also of significance to the administration of justice. The Criminal Justice Act of 1964, 78 Sta 3006A(b) (Appendix A, infra, p. A-1) provides for of counsel in a "criminal case." United States v. Supp. 291 (S.D. Cal. 1965) said a probation revocation in and that accordingly an aftormey aperiminal case, "and that accordingly an aftormey appeared an indigent in such a hearing is entitled to not "criminal supra, if this urged herein all federal 13, 1966, holding th is no constitutional right ing. GAO; B-156932, June] will henceforth not appoint counsel in such hearings, that are However, on June States disagreed, Wainwright, the position comptroller General of the United States disagre payment would not be made because such hearings representation in that there is no anticipated the retroactivity spectre of Gideon v. Wain Court waits until a later day to adopt the representation in such a proceeding. 248 F. Surr s case is criminal 18 U.S.C. Sappointment o 2/ This Federal 552, 18 Boyden,

A PROBATION REVOCATION PROCEEDING IS A PART OF THE CRIMINAL PROCEEDING, AND THE ASSISTANCE OF COUNSEL IS ESSENTIAL TO A FAIR HEARING.

phases '2d (Advance Sheets) than labels in ascertaining have, Bennett administration in the State of Washington (Appendix B, and stating from those Mempa opinion characterizes a probation revocation Paroles or by the prison authorities in administering other formed administratively by the State Board of Prison Terms But as even the court below has stated, assistance of counsel stated in Smith v. hearing as essentially quasi-administrative in nature, "the operations are essentially no different State v. Louie, 68 Wash. Dec. courts must look to substance rather constitutional rights to the And as (1966) 708, 712 (1961): 287, 413 P.2d 7 infra, p. B-12)." violated." of penal whether

acknowledging that the original order granting probation strictions and conditions arising out of his probationary status Cf. Schware "In a very realistic sense he is free, for his personal liberty does reof 551 (1956) (admission deferred Sentence is ordinarily permitted to return to his munity, his family and his job, subject only to behavioral "the chancellor's grace," it The fact remains that the recipient C-3 follow that no rights surround its revocation. Board of Educ., 350 U.S. C, infra, 232 (1957) (Appendix 353 U.S. may have been an exercise of slightly restricted." Bar Examiners, Slochower v. (public employment). state bar); Board of

dissenting opinion.)

Furthermore, of particular revoked only if the court finds that the probationer is "violating clear his record and remove outstanding penalties and disabilities come before the Court and peti-In the State of Washington, this probationary status may be "should not be subject to nullification by the whim of peremptory of the charges the terms of his probation, or engaging in criminal practices, is abandoned to improper associates, or living a vicious life. entering the He may thus significance, the probationer is accorded the right, after a fundamental rights, as stated by the dissent in Mempa, 'quasi-administrative' proceedings which do not even afford (Appendix C, infra, p. right to be represented by counsel at the time of negation of his conviction and dismissal RCW 9.95.240 (Appendix D, infra, p. D-2 to D-3). infra, p. D). successful probationary period, to nullifying judgment and sentence. RCW 9.95.220 (Appendix D,

wishes and needs to be heard, and when due process protects time when a defenjudicial hearing questions, i.e., Sutherland stated by Mr. Justice It is obviously a (1932): revocation proceeding is a vened to pass upon the most significant of Alabama, 287 U.S. 45, 68-69 reputation, sentence, etc. his right to be heard. As probation ^

if it did not comprehend the proceedings against him. smal1 law Even counsel "The right to be heard would be, cases, of little avail if it did not cothe right to be heard by counsel. Even intelligent and educated layman has sma sometimes no skill in the science of la He requires the guiding hand of counsel every step in

And see Gideon v. Wainwright, supra.

revocation proceedings in this country have unfortunately probation counsel at courts right to federal recognized the

convicted of a crime," and that the Constitution does not require Much of this can be traced to dicta used by Mr. Justice Cardozo And see Burns that of grace to one The result in Escoe V. fortunately, was not as bad as it might seem, for the case on to hold that the federal probation statute requires: (1935), to the effect notice or hearing on revocation of the "fayor." suspension of sentence, is an act United States, 287 U.S. 216 (1932). 490 Escoe v. Zerbst, 295 U.S. bation or

enable an accused probationer to explain away the accusation. While this does not require a trial in any strict or formal sense, it does require an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused failure of the inquisitor to carry theeper. [295 U.S., at 492] " Kadish, deeper. supra, case, moreover, did not involve the issue of the appointment counsel, and it preceded Gideon v. Wainwright, supra. The federal court approach in this area is typified by Brown Cir. 1965), but the decision was based primarily e.g., Kadish hearing was fecognized in United States ex rel Harton v. Wilkins, also refused to Remeriez v. Maroney, 415 Pa. 534, 204 A.2d 450 (1964) (hearing The right to counsel during a probation revocation 65; Note, Legal Aspects of Probation Revocation, 351 F.2d 564 (7th Cir. 1965), and the cases cited And see Commonwealth ex states have recognized the right. See, upon Pennsylvania law. Many state courts have right to counsel at such hearings. 311, 328-330 (1959). But many (2nd at.816. Colum L. Rev. 342 F.2d 529 recognize a v. Warden, 816, fn. therein. supra,

imposi 3/ Many of the federal cases deal with probation after the imtion of sentence, and are therefore distinguishable from this e.g., Brown v. Warden, supra.

v. Wainwright, in the violates The Equal Protection Clause of the Fourteenth Amendment P.2d 644 (1965) (Denial of counsel to an indigent probationer supra, and White v. Maryland, supra) and Hoffman v. Alaska, revoke probation and impose sentence is a "critical stage" proceedings and right to counsel exists, citing Gideon citing Griffin v. IlliMois, 351 U.S. 12 (1956). J

Warden, Volume I, No. In commenting upon the decision in Brown v. of Criminal Law Bulletin, 1965), had this to say: the editor (November,

to counsel deprivahis return to the District Court for restudy under 18 U.S. C. dant is denied the assistance of counsel in connection with the evidentiary hearing held to establish the alleged probation violation Wilkins, stablish the alley britton v.

F.2d 529 (2nd Cir. 1965); Commonwealth el. Remeriez v. Maroney, 415 Pa. 534, 201450, 451 (1964). Cf. United States v. 1450, 451 (1964). Tis entitled to court for r. > opinion, after receiving a maximum sentence "We disagree. Although the initial gree of probation may be a matter of grace, its revocation nevertheless results in a deprition of the probationer's liberty. It is imperative, therefore, that the revocation Commonwealth proceedings be consonant with established principles of due process. In our opinior these principles are violated where a defe ex rel. n. 451 (1. 162 (1. ans., 375 U.S. 162 (1. ans., 375 U.S. 165 (1. ans.) a 90 day completing 4208 (b). sentence

to counsel at a probation revocation proceeding was also recognized in Model Penal Code § 301.4 (Tent. Draft No. (1954) and 4 (1955) .]. The right

the and The basic nature of probation revocation proceedings,

counsel Stevens, The Defense of Indigent Persons thington - A Survey, 40 Washington Law Review 4/ A survey was taken of trial court judges in the six largest Was ington State counties (Cowlitz, King, Kitsap, Kittitas, Spokane and Yakima). Most of the judges responded that they do not appoint confor probation revocation hearings, "however, some of those who do rappoint counsel have some qualms about the fact that they have not 4/ A survey was taken of trial ington State counties (Cowlitz, Yakima). Most of the judges res in Washington Amandes and done so." Amander Accused of Crime 78, 85 (1965).

summarized in Kadish, supra, this stage, is well need for counsel at

at 833:

sufficient of the criminal the continued commission constated condition, entitling the court or stated condition, entitling the court or rency to consider whether revocation is thererency to consider whether revocation is the issue and procedural justice s liberty at stake meet the specific proper business task of ascerthe right to the assistance Indeed, in at war talk "[T]he determination to revoke and re-commit because of conduct in violation of the conditions on which release was granted, inview sometimes deunsel has been recognized as one of the itable principles of justice.' Indeed, contested revocation proceedings, the contested revocation proceedings and the contested revocation proceedings and the contested revocation proceedings. the parole officer or a brief interview the prisoner or a written report by an volves, if not exclusively, the coused issue centrally, the fairly narrowly focused issue of what the conduct of the releasee actually of what the conduct of the releasee actually of what the conduct of the release acts alleged, and measuring the acts proven against a standard to which he was obliged to conform is precisely the business of the critial itself where the right to the assistan outcome, contested revocation proceedings, the charged actually constitutes the commicriminal act. No doubt it is simpler or a board to make the o in these matters. The central task of ascetaining whether the prisoner has committed to it informal vestigator. But it would seem patently with the central concept of procedural ortunity to hear and meet the spagainst him with the benefit of that termination by whatever means seem the -- whether it be an on the expressed that a lawyer has no fact opportunity to hear depends to understand to be determined and the liberty of a person depen is difficult to understan persuade 'immutable counsel the deny charge faster many

But he admitted it when he appeared at the hearing withprobationer. The decision to admit or deny the violation charged For example, the petitioner in Mempa denied the Would he have surrendered as quickly if he had had The right to counsel at probation revocation hearings must probation violation -- burglary -- when he was first taken into Only with a lawyer at his side would he have been abl Cf. Miranda V. not be conditioned upon denial of the alleged violation by requires the advice of counsel. Arizona, supra. is crucial and lawyer? custody.

examine witnesses against him, or present mitigating circumstances to put the state to its burden of proof, or effectively crossin an attempt to dissuade the judge from revoking probation.

Wn.2d 883, 376 P.2d 646 (1962). It is fair to assume that petitioner and decisions of the State of Washington provide that even at this stage of the plea of guilty. RCW 10.40.175 (Appendix D, infra, p. D-3); State proceedings, petitioner could still move to withdraw his original and, of course, neither the v. Farmer, 39 Wn.2d 675, 237 P.2d 734 (1951); State v. Shannon, the motion. it. Finally, and of great importance, the statutes the trial judge advised petitioner of argue useless if no attorney is present to was ignorant of the right to so move, prosecutor nor

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COUNSEL THE OF SENTENCING IS A CRITICAL STAGE PROCEEDING, AND THE ASSISTANCE ESSENTIAL.

and from most decisions This ruling The Mempa decision, replied upon by the court below, made federal constitutional right to be represented by counsel when, following a plea of guilty and the revocation of probation, he the surprising pronouncement that a defendant does not have the first time sentenced on the criminal charge. this court; from prior decisions of within the United States.

Since this decision final sentence upon a prisoner in U.S. 162 (1963), it was and his counsel. In United States v. Behrens, 375 held to be error to impose a absence of the prisoner

below applies equally to a situation where probation opinion

and "punishment is fixed" as a "right, ancient in the law, [which] Criminal Procedure, there was no necessity for the Court to reach the right to be present when the "judge's final words are spoken" Criminal Rules, which pending legislation providing that a defendant's presence was not opinion concurring in the judgment, Mr. Justice Harlan referred the constitutional issue. Nevertheless the Court characterized statement in his own behalf and to present any information in was based upon the language of Rule 43 of the Féderal Rules of the court to 'afford the defendant an opportunity to the "possible constitutional issues which would be raised" by guage of the opinions recognizes that the right to be present The 5 375 U.S., at 165. In a required at final sentencing. 375 U.S., at 168, fn. compasses the right to be present with counsel. (a) of the Federal mitigation of punishment.' "' is recognized by Rule 32

the same right to counsel issue. In Townsend v. Burke, 334 U.S. 736 (1948), petitioner asserted a violation of due process in the acceptance It may fairly be said that the Court has already ruled upon counsel. In reviewing the proceedings, the Court found Elements. case, by overruling Betts v, Brady, supra, and through the operaconvicted on a plea of guilty to non-capital offenses, and The Gideon substantial prejudice which presence of counsel would have of his plea and imposition of sentence without being advised his right to counsel and without being offered assistance of the constitutional claim was subsimilar to the test used in assessing right to Accordingly, a due process violation was claims under Betts v. Brady, 316 U.S. 455 (1942); supra, employed in assessing Burke, Townsend subsequently

See Kadish, supra, trial. it does at sentencing as

right to counsel at sentencing, with some variations in rationales. supra, at 806-812; Annot., Absence of Counsel federal and state decisions have recognized the Thereof Sentence as Requiring Vacation 20 A.L.F. 2d 1240 (1951). at Time of e.g.; Kadish, Most

in Washington is as critical a function as trial, it is evident that White v. judgtime before judgment. This is the stage of the proceedings at which matters taken until 323, the trial mitigation of sentence can be presented, and objections would and Hamilton v. Alabama, supra. A motion to applies equally revoked and sentence imposed. State v. Farmer, plea where sentencing a final supra. the ends of justice will be served by permitting entry of 197 Wash. or the preliminary hearings and arraignment discussed in 256 P.2d RCW 10.40.175 (Appendix A, is discretionary with following ment has not been entered rand an appeal may not be Farmer, deferred and a defendant is placed upon probation, 209, State v. McDowall, judge, but the motion must not be denied where the court below 660 (1938); State v.Rose, 42 Wn.2d appeal State v. raised to illegal sentences. Furthermore, of guilty can be made any available on supra; a plea rule announced by of not guilty in its stead. v. Shannon, entered. of are to permit withdrawal few issues Sentencing and sentence are supra, withdraw a plea State probation is the guilty,

now permitted is deferred and a contested trial even though sentencing is deferred as is granted. However, this is permissible only if is conditioned upon a fine or serving time in jail and limited to claimed trial error. State v. Proctor, 68 2d (Advance Sheets) 808, P.2d (1966). 1.8 appeal modified. An recently Was rule probation review is Wash. Dec. 6/ This r following probation

as much as he would if he were sentenced immediately trial concerning his appeal presents following a sentenced needs advice the situation in which probation is granted an a plea of guilty. for and need the timing of probationer being or conviction appeal rights Consequently following and

III

PETITIONER DID NOT WAIVE COUNSEL

a constitutional requisite of the order settled a request below deals only with the merits and says nothing show that petitioner specifically during as (1962), "[I]t is But Furthermore, does not depend on quested representation by or appointment of counsel sentencing. counsel is 513 time of 206, to be furnished counsel Arizona, supra, at the 369 U.S. the assistance of The record does not or at Cochran, revocation hearing See Miranda right the court Carnley waiver that the

B-12) that waiver might have occurred because petitioner patently in Mempa (Appendix B, do not accepted propationary status on the basis 18 Mempa ct. theory in Mempa, dissent in of jurisdiction. waiver the court said court below does seem to indicate the This novel Court (1958). the existing statutes, which, to deprive this confer a right to counsel. 449 pleaded guilty and insufficient infra, p.

to be part of proceeding, requiring the appointment of counsel. The k case, which preceded petitioner's plea of guilty, was in Mempa. In fact, the trial court ignored McClintock Rhay, time McClintock v. first the so in Mempa for the proceedings. McClir 38), held sentencing appointing counsel sentencing stage of the prod d 615, 328 P.2d 369 (1958), sentence without overruled in Mempa. imposing McClintock Wn.2d criminal

the revocation hearing. the attorney petitioner's order knowingly, intelligently aived all constitutional rights and at the time as to petitioner the nature of his under the circumstances, it would be some of a strain, to say the least, to assume he fully appreciated all ramifications of u. S. 458 even ain, to say the le rappreciated all r deferred sentence this background, some doubt C-14) to fully comprehend and completely waived all cwith respect to subsequent Johnson v. Zerbst, 304 U. S of à time Johnson v. Zerbst, (Appendix C, infra, what of a strain, that he fully appretue order of deferr expresses at the of that "Against general expre situation entry ability

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TO AN INDIGENT PROBATIONER DISCRIMINATION. AN UNCONSTITUTIONAL OF COUNSEL THE DENIAL

The decision The Due Process and Equal for his below thereby creates discrimination between probationers who "prohibit the (Appendix for financially able to employ counsel economic ability from being a criterion so. 353 (1956)probation revocation hearing obviously will do Clauses of the Fourteenth Amendment California, 372 U. S. those who cannot opinion.) 12 U. S. C-13, dissenting 351 See Douglas v. Illinois, A probationer afford counsel and Protection Griffin v. accident counsel infra,

CONCLUSION

should petition above, set forth the reasons granted

Respectfully submitted,

Evan L. Schwab 1405, 1411 Fourth Avenue Seattle, Washington 98101 Donald A. Schmechel 1405, 1411 Fourth Avenue Seattle, Washington 98101

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Michael H. Rosen American Civil Liberties Union of Washington 2101 Smith Tower Seattle, Washington 98104

ATTORNEYS. FOR PETITIONERS

1966.

October 28,

19.

JUDGMENT OF THE COURT BELOW

Attorney General
of the State of Washington
STEPHEN C. WAY
Assistant Attorney General
Temple of Justice
Olympia, Washington 98501
753 5430

O SUPREME COURT

In the Matter of the Application for Writ of Habeas Corpus of

WILLIAM EARL WALKLING,

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Petitioner

V8.

he Washington State Penitentiary t Walla Walla, Washington,

Respondent.

NO. 3 9 0 0 2
ORDER DENYING APPLICATION FOR WRIT OF HABEAS
CORPUS

1966, the petition v writ STEPHEN that the application for hearing before 겁 for return and answer OF WILLIAM EARL WALKLING court having by his and October regularly return respondent's and it appearing and the court on the came on respondent Assistant Attorney General, and the this sidered the application of habeas corpus issue This matter attachments thereto, of corpus, following Department No. WILLIAM EARL of habeas a writ

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ngton county Were

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to the petitioner with to be provided assistance to t right to attorney to give and and assito be provided for at public of

the court being counsel, for the petitioner of respondent by considered the applymation for and the respondent, attachments WILLIAM EARL WALKLING, and on behalf General, concludes: the petitioner Assistant Attorney argument the premises, respondent court having of and oral of the the memorandum brief in the L. SCHWAB, WAY, of habeas answer of advised having heard Ü STEPHEN fully writ EVAN and

on the ground of decision by court's recent WALKLING for writ and his not wielated W.D.2d this court in Mempa v. Rhay, supra. signed controlled by of WILLIAM decision in Mempa v. Rhay, constitutional rights were reasons 13 the application habeas corpus for alleged this

the application of WILLIAM corpus be dismissed, IT IS HEREBY ORDERED that of habeas proceedings a writ the for and WALKLING denied hereby

18th this the Chief Justi of Chambers the Done of

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APPENDIX B

OPINION OF THE COURT BELOW

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN THE MATTER OF AN APPLICATION for a Writ of Habeas Corpus JERRY DOUGLAS MEMPA.

No. 38470

B

Petitioner,

J. RHAY, Superintendent, Washington State Penitentiary,

Respondent.

Filled

JUN 23 1966

At his arraignment in that court, the petitioner was represented member of the Spokane Bar, and now a judge of the Spokane County He was granted Mempa, with the advice of comsel, entered a The salient facts are: Petitioner, Jerry D. with "joy-riding," as defined and prohibited by RCW 9.54.020. This matter involves a petition for a writ of by court-appointed counsel, Willard S. Roe, then a prominent was charged in the Superior Court for Spokane County plea of guilty to the charge of "joy-riding." Superior Court. habeas corpus. Mempa,

the privilege of probation status, and the imposition of

Spokene County Prosecutor's Office moved to have mempa's probation Sentence (the statutory maximum term of imprisonment of ten years, subject, deferred pursuant to the provisions of RCW 9.95.200 County actual period of institutional confinement or custody) was then status revoked for violation of the terms and conditions under two months later), of course, to subsequent parole board action determining the At a hearing in the Spokane Superior Court, the petitioner's probation was revoked. Imposed and, promptly thereafter, judgment, sentence, order of comitment were entered accordingly. Thereafter (approximately which it had been granted. and 9.95.210.

Spokana Superior Court when (a) his probation status was revoked, (b) the deferral of sentence was vacated, and (c) its imposition Thus, the problem presented to us for The basis of this petition for a writ of habeas Jerry D. Mempa decision is whether probationer Mempa was entitled to comsel was not represented by counsel at the peremptory hearing in the state as a matter of constitutional right in relation to any one all of the foregoing aspects of administration of corpus may be conclasly described as follows: took effect forthwith. probation

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Relative to a deferred sentence, RCW 9.95.220 provides:

the court judgment after such revocation of a defendant shall be delivered to probation and the defendant shall be delivered sheriff to be transported to the penitentiary reformatory, in accordance with the sentence not been pronounced, the judgment has shall pronounce

people would disagree respecting the desirability of the objectives permits special handling of carefully selected criminal offenders nature of probation-what it is and is not--may be helpful to an petition for a writ of habeas corpus. It should first be noted who have pleaded guilty, or have been convicted of committing an part of the probationer, can be most conductive to the rehabilitacharacteristic of the probation device is that the person who is the probationer's ostensible "liberty" is somewhat misleading in At this juncture some observations regarding the orrangement is that probation status, with attendant supervision Probation offense against society. Perhaps in one sense the significant Thus, while that probation is a very useful and flexible tool or technique understanding of our decision herein denying Jerry D. Mempa's fortunate enough to qualify and to have been granted probation of probation and its constructive potential as a modern penal In fact, few well-informed and its emphasis upon law-abiding, responsible conduct on the The purpose or theory of such an the probationer is not confined to a penal institution, he tion of criminal offenders as useful members of society. device for the rehabilitation of criminal offenders. status is allowed to be at liberty in the commulty. that he is actually under probation supervision. of modern penal administration. remains in "semi-custody."

a matter of privilege It is not However, probation, or the acquisition of probation status, must be kept in proper perspective. matter of constitutional right.

initially implemented solely through an exercise of judicial rel. Schock v. Barnett, 42 Wn.2d 929, 259 P.2d 404 (1953). grace, suthorized by the state/legislature to be granted discretion by the Superior Court judges of the state.

conduct -- if not in terms of atonement or punishment, then clearly in terms of the possibility of their rehabilitation as productive -OZd has a substantial interest in guiding or conforming their future emotionally unvarnished facts are that probationers have broken No inference is intended that, once having broken They have a criminal record; and as a result society bationers, as a class, are criminal offenders, both in a legal And, once again, it should be the law, such individuals are forever branded as criminals and remembered that each such person who is afforded the privilege state has either (a) pleaded guilty, or (b) has been convicted of probation status by a judge of the superior courts of this of an offense probibited by the criminal laws of the state of forever afterward are to be treated as such. But the plain Furthermore, the fact must not be overlooked that and social or commutty sense. of society. Washington. the law.

While those having probation status are accorded conrespect, and the matter of their liberty and freedom as well as siderable freedom and liberty, their status and rights in this limitations and termination thereof, are not to be placed in the same category with the quentum of rights the average law abiding citizen possesses with respect to civil liberty

They have exhibited in the past a tendency (at least in one instance) to engage in Stated another way, probationers are not average, consistently deserving law-abiding citizens. legally disapproved antisocial conduct.

Considering probationers as a class of criminal offenders, particular sphere of administrative prerogative and, by judicial others who have pleaded guilty -- or have been convicted -- and have flat, exercise some sort of supervisory authority over existing there is a close analogy between their status and the status of The edministration been committed to institutional custody, supervision and disciand control of the activities and conduct of the latter group seem farfetched to suggest that the courts should invade this is of course performed by the prison suthorities. administration, standards and practices. pline rather than being granted probation.

probetion and the administration of the probation system, similar trol ovet the everyday matters of prison administration and/or parole edministration is not only not feasible; it is inadvis-Judicial scruting, review, and conparole of those criminal offenders who have been committed to reference and analogy could also be made to the functions of able in the light of the particular expertise and training authority and the responsibility for administration of the state institutional custody. In addition, the Board has the period of confinement and the terms and conditions of The Board In terms of further insight into the nature of the State Board of Prison Terms and Paroles. state probetion system.

expected to go into the prisons and decide which prisoners should necessary to provide effective institutional custody and parole The point is obvious: prison offi-Judicial invasion of prison administration in-The courts cannot and should not be cials must have effective control and suthority in order to evitably would be most disruptive of prison programing. can be The same probation programing and administration. maintain an effective prison program. be treated as "trustees." vision, and discipline. supervision.

programs for effective guidance of criminal offenders under their Ecsy access to the courts by probationers to re-evaluate, or challenge, varied aspects of by probation officers is a sensitive area, and one not particu-Administrative and field probation officers, as well probation programing could well be disserrous in terms of the convinced that effective supervision of the probation vehicle operation of the Washington state probation system. We are larly suited to detailed, over-all, or even general judicial as prison officials, work diligently to establish workable supervision and in their senicustedy.

It may seem somewhat more appealing and persuasive to to be at large in their committee than would be the case with contemplate according full due process rights and privileges to respect to the termination of the privileges of prison immates. probationers with respect to the termination of their liberty there are convinced that; while 975

and standards controlling the revocation of probation and matters three areas. To reiterate: there are no constitutional rights respecting the there should be correlatively few, if any, constitutional rights of administration and supervision of those who have been granted probationers, immates, and parolees, the problems of administrain the status and the potential for rehabilitation as between acquisition of probation status. Logically and rationally, objectives are basically similar in all that status. tion and the

determinations made with respect to the operation of our proba-The above outlined judicial views about the general nature of probation are re-enforced by the following language of RCW 9.95.220, which sets out certain legislative policy This legislation provides as follows: tion system.

or engaging in criminal Whenever the state parole officer or other officer whose supervision the probationer has been placed In its discretion without notice revoke or terminate such prohetion. In the event the judgment has been pronounced by the court and the execution thereof suspended, the court may revoke such suspendion, whereupon the judgment shall be in full force and effect, and the defendant shall be delivered to the sheriff to be trans-The court may thereupon state parole officer may rearrest any such person with es, or is abandoned to improper associates, or a victous life, he shall cause the probationer the case under whose supervision the probationer has been placaball have reason to believe such probationer is violating the terms of his probation, or engaging in cri to be brought before the court wherein the probation officer or judgment after such revocation on and the defendant shall be delivered to sheriff to be transported to the penitentiary or If the judgment has not been pronounced. or reformatory as For this purpose any peace rant or other process. ported to the penitentiary shall pronounce granted. praetices. living

to require the observance and application of due process standards there is nothing in the statute enacted by the legislature It should be noted that the foregoing statute provides delivered to the sheriff for transfer to the state penitentiary. is true that the revocation of probation does occur in revoked, sentence imposed, judgment rendered, and the defendant and the function is performed by a judge of the superior The statute further produe process standards which unquestionably are applicable thy peace officer or state parole officer may re-arrest a as to this facet of the administration of the state probation and must be observed in the more orthodox aspects of criminal vides that suspended or deferred sentences may be summerfly the court may thereupon, in its discretion, without notice, probationer without warrant or other process; furthermore, judicially assume responsibility for applying to probation We are not inclined, judicially, to impose, revoke and terminate such probation. administration. while it system. court, court, chose

Shannon, 60 Wn. 2d 833, 839, 376 P. 2d 646 contains the following statement: State v.

italicized portion ours.) Art. 1, 3 ... ld entitled to be r Climteck v. Rhsv;

petitioner relies strongly on the foregoing views expressed But the basic doctrinal premise of petitioner's Shannon

applied, or extended and made to apply, in a probation context. argument seems to be that the principle applied in the landmark decision in Gideon v. Walmaright, 372 U.S. 335 (1963), should

represented by counsel and offered no evidence to counter reported As in the instant decision of this court in State v. Shannon, supra. The criminal That court vecated the prior revocation of the criminal violations of the conditions of probation were reported. We will first discuss the above-quoted portion of the thus became an immate of the state penitentiary filled a petition The former probationer who Probation was The Superior Court for Thurston The criminal offender was for Thurston County where the prisoner had been tried and conpresent, reached the same result as at the previous probation The matter was remanded to the Superior Court A revocation hearing was held at which the defendant was not thereupon transferred from probation supervision and custody offender therein initially pleaded guilty to grand larceny. on the question of whether or not probation status should be for a writ of habeas corpus in the Superior Court for Walla offender's probation and, furthermore, appointed counsel to advise and represent the petitioner at a hearing to be held In other words, probation was revoked, revocation hearing when the probationer had not been repre-County, with the defendant and his court-appointed counsel noncompliance with the conditions of probation. sentence was deferred, and probation granted. to prison supervision and custody. revoked, and sentence was imposed. zevoked and sentence imposed. sented by comsel. Walls County. victed.

and, immediately thereafter, sentence was imposed by the court. defendant in the Shannon case thereupon appealed.

fact represented by court-appointed counsel in the Thurston County hereinbefore, did, in fact, coment upon the right to comsel in The language of Shannon cited by the petitioner herein could ad-However, there was in fact no issue of the right to probationer whose status has been revoked has the right to comthe revocation of probation and (b) the imposition of sentence. In the Shannon opinion this court, as indicated a probation context; t.e., the right to counsel apropos of (a) sel in a due-process constitutional sense at the imposition of his suspended or deferred sentence following revocation of his Superior Court at the time of revocation of probation and the compel explicitly before this court in Shannon. The reason mittedly be interpreted, and extended, to the effect that a The probationer in Shannon was in imposition of sentence. The issues specifically raised in Sharmon are not issues herein. should be quite obvious. probation.

decision therein, is not apt in terms of the facts in the instant subsequent imposition of sentence constituted dicta which, upon the facts and the issues involved, and properly limited to the a hearing concerning revocation of probation and at the time of the statements in Shannon as to an alleged right to comsel at Furthermore, State v. Shannon, supra, construed on the basis of further consideration, the court is reluctant and unvilling application for habeas corpus by Jerry D. Mempa. this apply in the instant case as the law of We also note in passing that In re McClintock v. Rhay, 52 Wn.2d 615, 328 P.2d 369 (1958) -- cited in State v. Shennon, supra -- did not involve revocation of probation and imposition It is therefore distinguishable on this basis provides no support for the claim of Mempa for a writ of habess corpus in the instant case. of sentence.

a suspended sentence and a situation somewhat akin to the modern concept of probation, as being inharmonious with our reasoning In this connection, we do not read State v. O'Neal, 147 Wesh. 169, 265 Pac. 175 (1928), an early case involving in the instant case.

supra, and State v. O'Neal, supra, may be inconsistent with the Insofar as State v. Shamon, supra, In re McClinock, views expressed in this opinion, they are hereby overruled.

possible rehabilitation of criminal offenders, probation status, case may be summarized as follows: While probation is a modern privilege to be granted solely in the discretion of the courts. bur views as to the problem presented in the instant or the granting of it by the courts, is a matter of grace or In the state of Washington the legislature has established a denying, Iimiting and terminating probation status innovation with much constructive potential in terms of the prescribed that due process standards shall be observed and state probetion system and has provided for its functions, limited, but admittedly significant, function performed in The legislature has not applied by the superior courts of Washington in the very operations, and edministration.

in terms of definitive action, is essentially quasi-administrative administering other phases of penal administration in the state. no constitutional rights respecting the acquisition of probation suspended or (2) deferred sentences. The function involved, And it is furthermore our reasoning that there are no constitutional rights involved in the termination or revocation tions of the superior courts involving imposition of either (1) of criminal offenders. We have previously held that there are or plenary in nature. The operations are essentially no dif-Ħ ferent from those performed administratively by the State of Prison Terms and Paroles or by the prison suthorities of probationary status, or in respect to the concomitant of Washington. status.

who, with counsel at his side, upon the entry of a plea of guilty A criminal defendant adequately represented by counsel, or in a trial culminating in conviction accepts probation status, of constitutional rights, admittedly pertaining to more orthodox any right to claim denial of criminal due process procedure in These clearly such a context it may even be said there has been a vaiver of authorize termination of probation and imposition of sentence without notice and without reference to allegations of denial a proceeding involving termination of probation status and eriminal proceedings in the trial courts of this state. does so on the basis of the existing statutes. imposition of sentence;

Inderlying petitioner Mempa's claim in the instant

Gideon in such a manner in the fordat or context of the administra the principles announced in the landmark Gideon case should apply batton and imposition of praviously (a) suspended or (b) deferred or should be extended to proceedings involving revocation of prono valid claim of deprivation of an alleged constitutional right-Petitioner Mempa was adequately represented by counsel at the time he entered a plea of guilty and accepted Thus, the petitioner was accorded full case, there may have been, as indicated, some conjecture that We are not constrained to read or apply at least not in a deferred sentence, probation, semicustody due process considerations at the appropriate time. edministrative context. the probation status. criminal sentences. tion of probation.

295 U.S. 490 (1935), is directly controlling of the instant matter. revoked by a federal district judge on an en parte showing without intent of Congress as expressed in the language of the applicable That decision involved a petition for a writ of habeas corpus by The main thrust federal probation statute -- requiring that "such probationer shall forthwith be taken before the court." The Escoe opinion clearly of the opinion is that such a procedure clearly contravened the decision of the United States Supreme Court in Escos v. Zerbst, negates the applicability of any specific constitutional safe-Nor can there be any valid contention that the an innate of a federal penitentiary whose probation had been constitutional due the probationer being brought before the court. negatives the existence of

the sole basis for granting the writ of habeas corpus. federal The above-mentioned federal statutory requirements affice perceining to matters involving the revocation of constituted probation.

any question of right to counsel -- either at the probation hearing Zerbst, supra, did not involve the imposition of sentence; and right to comsel at either raised by only question Furthermore, Ecoe v. stage of the proceedings is the perition in the instant case. or at

Zerbst, supra, to be controlling relative the probationer to be brought before the court wherein the pro-Thus, we do not regard the policy considerations the court during hearings concerning revocation of probation. The Washington statute likewise requires that "he shall cause instant matter. The appropriate 83 ment as to presence of counsel, burden of proof, right to federal statute required the presence of the probationer But there is no further statutory the United States Supreme Court, witnesses, et cetera. to our disposition of the and value judgments of enunciated if Escoe v. bation was granted."

present their side of the story to the court respecting reported state of Washington. scope of any such inquiry or hearing rests solely in the dis-In #11 fairness to a probationer -- and consonant with reguler and orderly court procedure--we would anticipate that probationers should and will be given an exportunity to violation of the terms or conditions of probation. of the jagget 1 cretion of the superior court

bationer was accorded his constitutional due process rights at successful in this court where the question is whether the pro or a petition for a writ of habeas corpus, will be He simply has none. the hearing. No appeal,

petidioner Mompa's allegations of denial of constitutional crimi-For the foregoing reasons, we find no merit in 80 It is nal due process procedural rights in the instant case. corpus should be denied. application for habeas ordered.

B-15

DISSENTING OPINION BELOW

No. 38470

of guilty and one And, by so doing, they open the door to and invite con-(1928), In re McClintock v. Rhay, 52 Wn.2d 615, 328 ecution, have taken, in my view, an unwarranted, unjustified and 646 (1962), which inferentially or directly characterize imposiprincipally because our procedures have been administered in the in overruling those portions of State v. O'Neal, 147 Wash. 169, tinued and increasing federal court disapproval and supervision due process concepts are receiving increasing and expanding atand confession procedures. Fortunately, in this state, we have HAMILION, J. (dissenting) -- I dissent. The majority, in connection with search, arraignment, appointment of counsel, been able to adapt to new concepts without undue inconvenience, When, however, we depart from fundamentally fair judido this at a time and in an era when constitutional rights and of state court criminal procedures. We have gone through this P.2d 369 (1958), and State v. Shannon, 60 Wn.2d 883, 376 P.2d cial processes, and cavalierly authorize discrimination in the trition of criminal judgment and sentence as part of a criminal unrealistic step backward in the administration of justice. right to counsel between one whose judgment and sentence is most part with befitting and uniform regard to fundamental ness in the treatment of individuals before, our criminal imposed immediately following conviction or plea 265 Pec. 175 bunals.

potentially voidable institutional commitments. Given no requiresituation may be acceptable in some administrative contexts, but for representation by counsel, it is inevitable that revocan in the first instance be most effectively, efficiently trial court level, when and where criminal prosentence may be imposed anywhere from a few it can hardly be said to comport with the dignity of the judithe efficient adminseveral years later, we are inviting probation and Disparity of standards among the courts in the search, confesrevocation procedures which can well lead to questionable and cation procedures will very from defendant to defendant, from and economically provided, is simply not good judicial policy, sion and right to counsel cases has long since proven the unistration of justice, for to short change an individual of county to county, and from trial judge to trial judge. cial process or the traditional role of courts in Neither does it lend itself to wisdom and inefficiency of such a course. due process protections at the whose judgment and months to ceedings.

I have no quarrel with the majority's thesis that an tences and probation are rehabilitative measures which descend Neither do I differ with the theory that deferred senupon the deserving miscreant "by the grace" of the sentencing errant individual who has been released from official custody speaking, in "semi-custody" by virtue of probationary regulaby way of an order of deferred sentence remains, technically tions.

of final judgment and sentence arising out of these fine phrases. either at the time of hearing or But, I find little realistic support for the majority's thing to say there are no due process rights at such a critical stage of a criminal prosecution as the revocation of probation constitutional or due process right to the chancellor's "grace," but quite another The two and the imposition of final judgment and sentence. It is one thing to say that there is no simply do not go hand in hand: denial of the right to counsel

It cannot be gainsaid that the recipient of the "grace" is otherwise subjected order of deferred sentence is the benefictary of some very and substantial advantages which do not flow to one who is probationary status. In a very realistic sense he is free, for penalties and disabilities. This latter privilege, even if unof deferred sentence in his hand is ordinarily permitted to reful probationary period, of coming before the court and petinificant importance, he is accorded the right, after a successturn to his community, his family and his job, subject only to the behaviorial restrictions and conditions arising out of his sig-He may thus clear his record and remove outstanding for a negation of his conviction and a dismissal The individual with has personal liberty is but slightly restricted. / And, accompanied by the other benefits, is a matter of or who sentenced to a custodial facility, final judgment and sentence.

right which subject to nullification by the whim of perimportance in our society today. It is clearly distinguishable say nothing of the sacred right of personal lib afford the right to be represented by counsel at the time of emptory "quasi-administrative" proceedings which do not even fairness and the dignity of the judicial process dictates from a procedural right. It amounts to a substantial RCW 9.95.240. tering the nullifying judgment and sentence. is afforded by legislative enactment. erty, should not be 2 right,

anomalous. In effect, the majority isolates this particular and sentence following a revocation proceeding is somethereafter to and including the time of entry of final, This court has held in State v. Farmer, 39 Wn. 2d 675, 237 P.2d 734 (1951), that the recipient of an order of deferred sentence is not entitled to an appeal from his conviction until view that due process concepts are fulfilled by affording counand Thus, the majority's that such concepts do not contemplate the right to counsel sel at the time of entry of the order deferring sentence, concept of the context and 4 entry of final judgment and sentence. and sentence from the time jud ment

following her a plea of guilty or a verdict of guilty. Hence, the ht to counsel at the time of revocation must be considered the context of either form of conviction. following a plea of guilty is very limited. However, the feated sentence statute permits entry of such orders foll

judgment and sentence, whether entered with or without an inter vening order of deferred sentence, bodes well to deprive en inthis prosecution; but, be-The reason for this legalistic tightrope walling is obscure to me, particularly when considered with the fact that the final ordinary criminal prosecution and says to the individual; you cause you initially received a deferment of sentence, you are assist you'n determining that a proper sentence is imposed? not now entitled to counsel to advise you of this right or dividual of his personal liberty and to forever nullify conviction. the opportunity of clearing his record of may now appeal for the first time in

They quote with emphasis RCW 9.95.220, which provides in that dispenses with the necessity for some type of hearing or the part that the superior court may, in its discretion, without no-On the contrary, by providtime statute purports to dispense with formal notice as a prereq-It may be granted that language or in any reasonable concept of fundamental fairness statute dealing with revocation of suspended or deferred senuisite to revocation; however, I find little in the statutory The majority seek sustenance for thear position in course of which fair to assume the legislature anticipated that a judicious efter rearrest for cause, 1.e., violating his probation, ing that the probationer should be brought before the judicial proceeding would ensue, during the tice, revoke and terminate probation. right to be represented by counsel.

fundamental rights of society as well as those of the probationer and due process concepts Incarcerated and paroled person possessed of more fundaof his parole, short of conviction of another crime, would passing that the legislature, in enacting standards for revocaparole board, (b) to be represented by counsel at such hearing, that the courts should, at this stage of the prosecution, shed would be respected. Certainly, the legislature did not intend coward a defendant. At this point, it should be observed in tion of parole, provided that a parolee charged with a violamental rights before an administrative board than this court Thus, we have the incongruent situation of a conbe entitled (a) to a fair and impartial hearing before the and assume a swashbuckling "quasi-administrative" attitude and (c) to defend and present evidence on his own behalf. willing to afford to a probationer in a court of law. traditional concern for fair play 9.95.120. victed,

there is no legislative, constitutional or due process requirement of formal notice of a projected probation revocation, but 8 affording counsel, if not at the hearing, at least at the time Again, it seems to me, it is one thing to say that quite a different thing to say there is no legal requirement for holding a nearing, assessing the reason for revocation, of entry of an appealable judgment and sentence. The majority also appear to proceed upon the premise and qualifies cr Ime that once a person stands convicted of a

If in no other way than through the equal protection can be little doubt that the right to personal as valuable and sacred to one who has been convicted not be fully spelled out in the federal and state constitutions the fourteenth emendment to the federal constitution. jury. But, there seems to be little reason or justification to traditional safeguards as the right to be present at a judicial some constitutional rights, e.d., the right to further trial by at the hearing for at It may be conceded that such a person, by virtue the time of imposition and entry of the appealable final judgof the criminal conviction, waives or forfeits the benefits of while these rights as to probationers may the probability of reformation and warrants the grace advised of the nature of the alleged probation violation, the find on nothing in our proceeding designed to revoke his probation, the right to be suppose that such a person waives or forfelts such basic and right to present explanatory or mitigating evidence, or the class citizen, despite the fact that his past history and partakes of the conditional liberty afforded by an order deferred sentence, he is immediately shorn of constitutional the majority cast such a trespasser into the role of safeguards which otherwise surround a criminal prosecution. would seem reasonable to conclude that they inhere in right to be represented by councel either H to one who has not. ment and sentence. there of a crime as of probation. liberty is Certainly, clause of

preservation of fair standards of justice vanish in the mystical son is entitled to be properly heard when a court of law undertakes to deprive that person of his personal liberty, condition any per-Instinctively one shrinks from this it seems incompatible to say to a defendant that he is entitled to constitutional safeguards in all the usual facets of a Criminal prosecution, including the right to counsel at all stages constitutions that indicates a contrary belief. Neither can it seriously questioned that the strength of our constitutional of government lies in the protection efforded to the weak phases of a criminal prosecution for the purpose of parceling interest in the capricious of the proceeding, unless and until he is granted probation, strength by isolating, with surgeon-like precision, various out, with Scrooge-like finesse, due process protections. autocratic approach, for instinctively one feels that if this be so, it ill behooves us to and unfortunate, against injustice or arbitrary and whereupon due process concepts and society's though that liberty might be. judicial grade. Arid.

and probation are comparatively modern, flexible, sensitive and From this they then posit that courts should be slow to translate into constitutional terms the theory that the "privilege" of probation is The majority next point out that deferred sentences a matter of "grace," and that revocation is a matter incovations in the field of eriminology. potent

The majority, however, distort the probation concept and attach too much significance to the above quoted words administrative function, and thus seek to carry it beyond cona quasistitutional dimensions and beyond the normal range of the when they characterize the revocation procedure as dicial process. "discretion."

because a judge may eccept, reject, or modify a recommendabasically begins and ends with the supervision of the convicted interested and concerned with reformation of the offenders does out of statutory punishment is distinctively, traditionally and able in a given case. With but relatively few statutory excepoffender. Because both the judge and the administrator may be It is no more an adminfunction simply because there are alternative solutions availnot mean that their functions becaus indiscernably commingled, peculiarly tion of probation or revocation by an administrator does not or medifying a di-The adjudication of criminal guilt and the meting tions, the administrative function in the field of penology vorce decree, and it does not partake of an administrative meen that the judiciary is disruptively invading a function than granting, denying a judicial function. administrative province. constitutionally istrative

and F mistaken, prejudiced, whimsical or arbitrary should and do stand as a bulwark between the individual The bare and unvarnished truth is that the possibility

administrative action. And, when the courts obcisantly hesitate involved therein with adequate, even though minimal, constituto surround any facet of their proceedings and any individual safeguards they are abdicating their responsibility.

the granting of probation in the first instance is not a matter and probation and subsequently stands before the semp court acant's liberty, his reputation and future record, and his appelprosecuting attorney and to some degree by the administrative The majority appear willing to concede that, while If the defendant receives a deferment of sentence cused by an administrative officer of a probation violation, identical. The state is again represented by the The state is represented by the procecuting stelles then are the The defendant, however, now stands barren of a to the assistance of counsel. . I find no purpose, reason of right, a defendant is constitutionally entitled The counsel at that point. situation. in this late remedics. stakes are

matter of practical necessity he should have the assistance of The fear that the presence of counsel would tend to such proceedings into protracted hearings is without If there is defendant is not only entitled to a fair hearing, but as a valid factual issue as to the alleged probation violation, in evaluating his defense, assembling his evidence merit and is nothing more than a red herring.

The average defendant is otherwise virtually helpless, and it is only in this way that the court can be fully, subpoenaing and interrogating his witnesses, and cross-examining defendant's background, and the alternative solutions the Here again counsel, with his knowledge of court procedavailable can be of inestinable assistance to the defendant and to the probation violaa matter of vital concern to both the defendant and the and extent of the punishthat the defendant was advised of his situation, and remove of substantially more help than hindrance to the court. intelligently and efficiently advised. In the vast maj very minimum, the presence of counsel would assure the lurking feeling of unfairness that surrounds sending resented person to a penal institution. cases, however, there is no dispute as The only issue is the nature opposing witnesses. ures, the

constitutional safeguards at the revocation stage would weaken particularly when administered by and through a court of In fairness to any probationer, the procedures utilized to avoid the possibility, however remote, the fear that providing revocations founded on accupations arising out of mistake, The threat of arbitrary or whimiscal should always be accompanied by fundamental Retribution, either, cooperation the rehabilitative purposes of probation. 3.0 mitment does not tend to encourage Likevise without merit udice and caprice. costgned swift, should s Eess.

successful rehabilitation. Reformation can best be accomplished by fair, consistent, and straightforward treatment of the indi-No doubt it was this thought, in part at least, which prompted the drafters of the Model Penal Code for The American (1954) and 4 Law Institute to provide, in Tent. Drafts Nos. 2 follows: \$ 301.4, as

right to hear and controvert the evidence against him, bation or increase the requirements imposed thereby on the defendant except after a hearing upon written notice to the defendant of the grounds on which such action is proposed. The defendant shall have the offer evidence in his defense and to be repre-The Court shall not revoke a guspension sented by counsel.

ford counsel will be accorded the opportunity of having counsel. at their side throughout the proceeding. It would, indeed, be appearing before the superior court in a revocation proceeding to a defendant at the revocation stage of probation could well practical and realistic matter, those probationers who can afthe rare superior court judge who would deny them such a privthereby projecting discrimination between probationers who can Finally, and perhaps fatally, the denial of counsel inferentially points out, in all instances a probationer Yet the majority would deny this right to indigents, raise serious constitutional questions of discrimination be-Due process and equal As the majority As a will ordinarily be given an opportunity to be heard. tween affluent and indigent probationers. counsel and those who cannot.

Illinois, 351 U.S. 12, 100 L. Ed. 891, 76 Sup. Cc. 535 (1956). protection prohibit the accident of economic ability from being 9 L. Ed. 2d 811, 83 Sup. Cc. 814 (1963); Griffin See Douglas v. California, criterion for right to counsel. U. S. 353,

edgeably walved any and all rights to due process of law at the the encludes that petitioner by accepting a deferred sentence knowland rigidcase. It is conceded by the attorthe majority is but emphasized by further indicates that petitioner had not completed the eighth grade, and that since 1956 he had progressed through a variety at the time of time of any subsequent revocation proceeding. Aside from the majority opinion, as it relates to petitioner, in effect conthrough these various institutions were under the aegis of the Turning then from the general to the specific, the State Hospital, the Diagnostic Center at Fort Warden, Western fact that it is extremely doubtful that any such theory of The record the arraignment proceedings and the revocation, State Hospital, and again Eastern State Hospital with a conof state institutions including Green Hill Academy, Eastern whether he was a psychopathic delinquent. His migrations time of flict of opinion between the latter two facilities as to try of the order of deferred sentence, the harshness but 17 years of age. waiver was fully explained to petitioner at the general, and supported by the record, that ity of the position taken by in 1959, petitioner was facts appearing in this offense,

juvenile court. His first appearance in superior court arose of the offense for which he is presently in custody.

expresses some doubt as to petitioner's ability to fully comprehend the nature of his situation at the time of the revocation ramifications of the order of deferred sentence and to assume that he fully appreand competently waived all constitutional rights with respect hearing. And, under the circumstances, it vovid be somewhat Against this background, even the attorney general the time of entry of that order knowingly, intelligently Johnson v. Zerbst, 304 U.S. 458, (1938). L. Ed. 1461, 58 Sup. Ct. 1019, 146 A.L.R. 357 least, subsequent proceedings. of a strain, to say the ciated all

In summary and in conclusion, I would

- (1) Reaffirm the right to counsel at the time of inposition of sentence as established in the O'Neal, McClintock and Shannon cases, supra;
- Prospectively overrule that portion of In re Jaime bationer is not entitled to counsel at the revocation hearing, and afford such right at all future revocation hearings; and (1961), which holds that v. Rhay, 59 Wn.2d 58, 365 P.2d 772 3
- Grant the writ of habeas corpus and remand petisentencing court for rehearing and resentencing with-counsel present tioner to the

HAMILTON, J.

DOMWORTH,

dissenting opinion.

STATUTES

(p) 3006A S 18 United States Code, 552, 78 Statutes

e in which other properly be represented by the same counsel, or when sause is shown. Counsel appointed by the United States or a judge of the district court shall be selected of attorneys designated or approved by the district separate the defendant is charged with a real counsel, the United than a petty offense, and appears without counsel, the United States commissioner or the court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable will be appointed to represent him if he is financially unable to obtain counsel. Unless the defendant waives the appointment to obtain counsel. obtain counsel. Unless the derendanc warver court, if satisticounsel, the United States commissioner or the court is financially after appropriate inquiry that the defendant is financially be after appropriate inquiry that the defendant is financially ble to obtain counsel, shall appoint separate United States commissioner or the court shall appoint separate United States commissioner or the conflicting interests that case criminal every counsel . -- In of Appointment cause ssioner or a panel of ther good commissioner cannot counsel court. From

Revised Code of Washington (RCW):

granting under is as the board may designate for investi-ne court at a specified time, upon the cir-the crime and concerning the defendant, hi family surroundings and environment. In pléa or of the determine, the court After the dings and environment. parole officers working if granted. the board of prison terms and paroles in wherein the defendant is convicted by pletthe court may, in its discretion, refer tecting attorney or sheriff of the county 9.95.200 Probation by court--Board to investigate. A conviction by plea or verdict of guilty of any crime, the cupon application or its own motion, may summarily grant or probation, or at a subsequent time fixed may hear and deterin the presence of the defendant, the matter of probation o defendant, and the conditions of such probation, if granted of such probation, if granted prior to the hearing on the got to the board of prison terms defendant, and the conditions of such prob court may, in its discretion, prior to the of probation refer the matter to the board paroles or such officers as the board may lty, the court may, in prosecuting attorney or regularly employed investigation and report. to the report to the surrounding to ord, and his supervision of ty or counties to the prose in the presence of defendant, and the are no record, case there and cumstances verdict proper

conditions execution y continue The 9.95.210 Conditions may be imposed on probation. granting probation, may suspend the imposing or the the sentence and may direct that such suspension may such period of time, not exceeding the maximum term rept as hereinafter set forth and upon such terms and determine shall for such except in

The court in the order granting probation and as a condition of, may in its discretion imprison the defendant in the count for a period not exceeding one year or may fine defendant any thereof,

the action, the payment persons imprisonment shall of family support, (2) to make restitution to any person or person who may have suffered loss or damage by reason of the commission of the crime in question, and (3) to pay such fine as may be imposed, and court costs, including reimbursement of the state for costs of extradition if return to this state by extradition was required, and may require bonds for the faithful observance of any and all conditions imposed in the probation. The court shall order the probationer to report to the board of prison terms and paroles or such officer as the board may designate and as a concourt may also instructions of prison ter 98 impose both the court for the defendant to make such monetary payments, of it deems appropriate under the circumstances, by (1) to comply with any order of the court for y support, (2) to make restitution to any person The and regulations to follow implicitly the his probation. court costs. with such probation in dition of said probation to follow impl the board of prison terms and paroles. and paroles will promulgate rules and r of such person during the term of his p thousand with such and one connection county jail exceeding as it necessary of family require the

supervision the probationer has been placed shall have reason to believe such probationer is violating the terms of his probation, or engaging in criminal practices, or is abandoned to improper associates, or living a victous life, he shall cause the probationer to be brought before the court wherein the probation was granted. For this purpose any peace officer or state parole officer may recourt may thereupon in its discretion without notice revoke and terminate such probation. In the event the judgment has been pronounced by the court and the execution thereof suspended, the court may revoke such suspension, whereupon the judgment shall In the event the judgment has been the execution thereof suspended, the nsion, whereupon the judgment shall and the defendant shall be delivered orted to the penitentiary or reformajudgment has not been pronounced violation of probation--Rearrest--Imprisonment. state parole officer or other officer under whose the probationer has been placed shall have reason revocation of sheriff the in t after such redelivered to the te such suspension, who see and effect, and the to be transported to tory as the case may be. If the juthe court shall pronounce judgment bation and the defendant shall be deransported to the penitentiary or imposed. sentence full force sheriff to 220 the court may r 9.95. the Whenever the with

bation completed. Every defendant who has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, may at any time prior to the expiration of the maximum period of punishment for the offense for which he has been convicted be permitted in the discretion of the court to withdraw his plea of guilty and enter a plea of not guilty, or if he has been convicted after a plea of not guilty, the court may in its been convicted after a plea of not guilty, and in either case discretion set aside the verdict of guilty; and in either case released from disabilities resulting from the offense or has been convicted. The probationer shall right in his probation papers: PROVIDED, the prosecution, for any other offense, such proceeds. offense, such shall have lilty and enter a plea of not guilt lafter a plea of not guilty, the c t aside the verdict of guilty; and thereupon dismiss the information against such de ndant, who shall thereafter be all penalties and disabilities resulting from the crime of which he has been convicted. The proba and in any subsequent prosecution, for any conviction may be pleaded and proved, which he has been informed of this

information lo.40.175 Substitution for plea of guilty. At any time before judgment, the court may permit the plea of guilty to be withdrawn, and other plea or pleas substituted. granted, or a ger effect as if probation had not been or indictment dismissed.

Office Supreme Court, U.S. F I L E D

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In the Supreme Court of the United States

October Term, 1966 No. 22

WILLIAM EARL WALKLING,

Petitioner.

V.

B. J. Rhay, Superintendent of the Washington State Penitentiary, at Walla Walla, Washington, Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

JOHN J. O'CONNELL, Attorney General of the State of Washington,

STEPHEN C. WAY,
Assistant Attorney General,
Counsel for Respondent.

Office and Post Office Address: Temple of Justice, Olympia, Wash. 98501. Telephone 753-5430, Area Code 206.

In the Supreme Court of the United States

October Term, 1966 No. 734

WILLIAM EARL WALKLING,

Petitioner.

V.

B. J. Rhay, Superintendent of the Washington State Penitentiary, at Walla Walla, Washington, Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

JOHN J. O'CONNELL, Attorney General of the State of Washington,

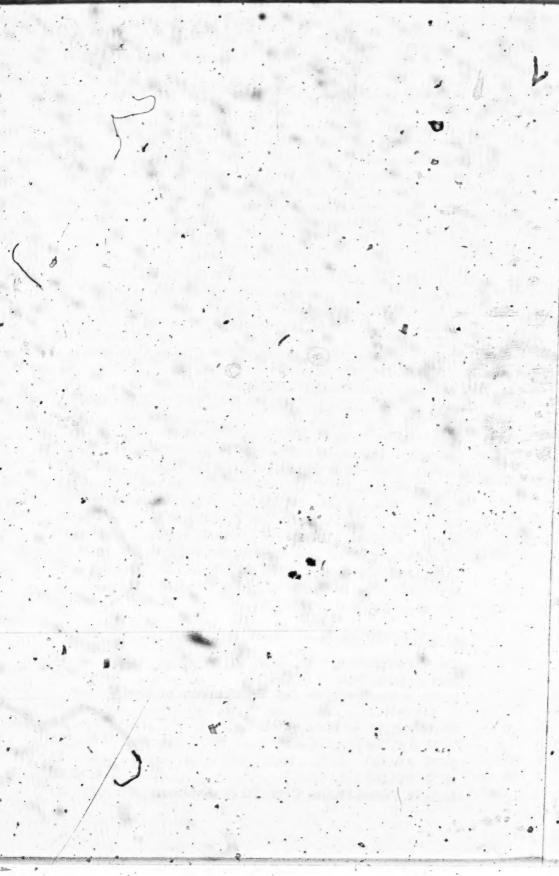
STEPHEN C. WAY,
Assistant Attorney General,
Counsel for Respondent.

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In the Supreme Court of the United States

October Term, 1966 No. 734

WILLIAM EARL WALKLING,

Petitioner,

V

B. J. Rhay, Superintendent of the Washington State Penitentiary, at Walla Walla, Washington, Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

To: THE HONORABLE EARL WARREN, CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The petitioner, WILLIAM EARL WALKLING, prays this court to issue a writ of certiorari to review the order of the Supreme Court of the State of Washington, denying his application for a writ of habeas corpus. (Tr. 2.)

COUNTERSTATEMENT OF THE CASE

Except to the extent noted below, the respondent accepts the statement of the case as recited in

of the State of Washington certified to this court by the Clerk of the Supreme Court of the State of Washington)

the petitioner's application to this court for a writ of certiorari.

On line 5, page 4 of the petitioner's application for writ of certiorari, the petitioner, in reciting the particulars of what transpired in the Superior Court of the State of Washington for Thurston County at the time of the hearing on the petition for revocation of his probation relates:

The petitioner advised the court that he thought an attorney had been hired by his family to represent him.

This allegation of facts by the petitioner appears for the first time in his petition to this court and is not found of record in the case before the Supreme Court of the State of Washington.

It should also be noted in the petitioner's a plication for a writ of habeas courpus to the Supreme Court of the State of Washington (Tr. 62) that on February 26, 1964, he had been advised by Judge D. J. Cunningham of the Superior Court of the State of Washington for Lewis County of his right to counsel at the time of arraignment on a forgery charge in that county. This, in accordance with the petitioner's contentions, transpired prior to his appearance before the Superior Court of the State of Washington for Thurston County on the petition for revocation of his probation.

At page 5 of the petitioner's application to the court for certiorari, counsel for the petitioner attempts to use to his advantage the position taken by

the Attorney General in this case in which the Supreme Court of the State of Washington was asked to reconsider its decision in *Mempa v. Rhay*, 68 W.D.2d 874, 416 P.2d 104. The position of the Attorney General in this case, as in *Mempa*, supra, was at odds with the results of both cases.

It has been a policy of long standing between the Supreme Court of the State of Washington and the Attorney General of Washington in post conviction proceedings to assume an advisory rather than an adversary role, and to clearly advise the court what the Attorney General believes the law to be, or what the law of Washington should be on the many constitutional issues which arise in these cases. This practice results in the Attorney General of Washington, on many occasions, actually becoming an advocate for the petitioner for habeas corpus, rather than in opposition to his cause. Such a circumstance arose in this case. More importantly, this practice is jeopardized when counsel, as in this case, seek to use to their advantage the advisory role of the Attorney General to the Supreme Court of the State of Washington.

Accordingly, we respectfully request the court to disregard the second paragraph on page 5 of the petitioner's application to this court for a writ of certiorari, as well as the memorandum brief of the respondent before the Supreme Court of the State of Washington which is found between pages 3 and 29 of the transcript of proceedings before the Supreme Court of the State of Washington,

REASONS FOR NOT GRANTING WRIT OF CERTIORARI

A. Probation Revocation Hearings Are Not "Criminal Prosecutions" Within the Sixth Amendment to the Constitution of the United States.

Probation is a concept for the rehabilitation or reformation of criminal offenders which is of modern innovation. In Washington, as in most jurisdictions, probation is authorized by statute and is quite frequently utilized by the court in an effort to effect a change in the undesirable behaviorable patterns of the criminal offender. It can result, when probation is successful, in the expunging of the criminal record out of which the probation arises. (RCW 9.95.240)

Consideration by the court as to whether or not the criminal offender is a suitable candidate for the granting of probation comes after conviction, either upon a plea of Guilty or a verdict of Guilty. (RCW 9.95.200)

In the case at bar, the petitioner was represented by counsel at the time of his plea of Guilty to the crime of BURGLARY IN THE SECOND DEGREE, and as well, at the time of application to the court to be granted probation. Both the petitioner and his counsel were then aware of all the facts and law bearing upon his innocence or guilt of the crime charged and any and all appealable errors or irregularities and the consequences of conviction and, as well, of the acceptance of probation under the probation act.

(RCW 9.95.200-9.95.240) At the time of the appearance of the petitioner and his counsel before the Superior Court of the State of Washington for Thurston County following his conviction and requesting that probation be granted, it was the law of Washington that probation revocation hearings are not in the nature of a criminal prosecution, and, the ordinary constitutional right to the appointment of counsel as prescribed by the constitution is not applicable. Jaime v. Rhay, 59 Wn.2d 58, 365 P. 2d 772 (1961).

The Sixth Amendment to the Constitution of the United States defining the rights of accused persons, including the right to counsel, provides:

In all criminal prosections, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. (Emphasis ours)

The decision in Jaime v. Rhay, supra, finding that the right to counsel did not apply in probation revocation hearings, was based upon a premise that such a hearing was neither a criminal prosecution nor a part of the criminal proceedings leading to the conviction of the defendant as contemplated by the Sixth Amendment. That this is true should be clear. The question before the court at the time of the hearing upon the motion to revoke a convicted de-

fendant's probation is not directed to the probationer's guilt or innocence of the underlying crime, but the inquiry goes to the truth of the accusations made of a violation of the conditions of probation. The sole subject of inquiry is whether or not the convicted defendant has breached the trust vested in him by the court.

The petitioner asserts that a probation revocation hearing brings to the fore, significant questions which may result in liberty or imprisonment and, therefore, due process concepts of right to counsel inhere in the proceedings. Such an argument conveniently overlooks the fact, that the resulting sentence on revocation of probation, is not imposed for the violation of probation, but, the sentence is the punishment for the crime for which the defendant had previously been convicted upon his plea of Guilty, or upon the verdict of the jury of Guilty.

The source of a convicted defendant's rights in a probation revocation hearing, in Washington, arise solely and completely under the probation act (RCW 9.95.200-9.95.240) and not from the constitution of this state or of the United States. A probation revocation hearing, not being a "criminal prosecution", decisions of this court concerning the rights of accused persons to have the assistance of counsel at various stages of the criminal proceedings, we submit, are neither applicable nor controlling under the circumstances. Cf. Gideon v. Wainwright, 372 U.S.

335, (1963); White v. Maryland, 372 U.S. 59 (1963); Douglas v. California, 372 U.S. 353 (1963).

In the petitioner's case before the Supreme Court of Washington, the court in denying his application for a writ of habeas corpus took the position that the disposition of his petition was controlled by its recent decision in *Mempa v. Rhay*, 68 W.D.2d 874-877, 416 P.2d 104 which reads in part as follows:

Considering probations as a class of criminal offenders, there is a close analogy between their status and the status of others who have pleaded guilty—or have been convicted—and have been committed to institutional custody, supervision and discipline rather than being granted probation. The administration and control of the activities and conduct of the latter group is of course performed by the prison authorities. It would seem farfetched to suggest that the courts should invade this particular sphere of administrative prerogative and, by judicial fiat, exercise some sort of supervisory authority over existing prison administration, standards and practices.

In terms of further insight into the nature of probation and the administration of the probation system, similar reference and analogy could also be made to the functions of the State Board of Prison Terms and Paroles. The Board fixes the period of confinement and the terms and conditions of parole of those criminal offenders who have been committed to state institutional custody. In addition, the Board has the authority and the responsibility for admin-

istration of the state probation system. Judicial scrutiny, review, and control over the everyday matters of prison administration and/or parole administration is not only not feasible; it is inadvisable in the light of the particular expertise and training necessary to provide effective institutional custody and parole supervision. Judicial invasion of prison administration inevitably would be most disruptive of prison programing, supervision and discipline. The courts cannot and should not be expected to go into the prisons and decide which prisoners should be treated as "trustees". The point is obvious: prison officials must have effective control and authority in order to maintain an effective prison program. The same can be said of probation programing and administration.

Administrative and field probation officers, as well as prison officials, work diligently to establish workable programs for effective guidance of criminal offenders under their supervision and in their semicustody. Easy access to the courts by probationers to re-evaluate, or challenge, varied aspects of probation programing could well be disastrous in terms of the operation of the Washington state probation system. We are convinced that effective supervision of the probation vehicle by probation officers is a sensitive area, and one not particularly suited to detailed, overall, or even general judicial supervision.

It may seem somewhat more appealing and persuasive to contemplate according full due process rights and privileges to probationers

with respect to the termination of their liberty to be at large in their communities than would be the case with respect to the termination of the privileges of prison inmates. However, we are convinced that, while there are some differences in the status and the potential for rehabilitation as between probationers, inmates, and parolees, the problems of administration and the objectives are basically similar in all three areas. To reiterate: there are no constitutional rights respecting the acquisition of probation status. Logically and rationally, there should be correlatively few, if any, constitutional rights and standards controlling the revocation of probation and matters of administration and supervision of those who have been granted that status.

The above outlined judicial views about the general nature of probation are reinforced by the following language of RCW 9.95.220, which sets out certain legislative policy determinations-made with respect to the operation of our probation system. This legislation provides as follows:

Whenever the state parole officer or other officer under whose supervision the probationer has been placed shall have reason to believe such probationer is violating the terms of his probation, or engaging in criminal practices, or is abandoned to improper associates, or living a vicious life, he shall cause the probation at ioner to be brought before the court wherein the probation was granted. For this purpose any peace officer or state parole officer may

rearrest any such person without warrant or other process. The court may thereupon in its discretion without notice revoke and terminate such probation. In the event the judgment has been pronounced by the court and the execution thereof suspended, the court may revoke such suspension, whereupon the judgment shall be in full force and effect, and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory as the case may be. If the judgment has not been pronounced, the court shall pronounce judgment after such revocation of probation and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory, in accordance with the sentence imposed. (Italics ours.)

It should be noted that the foregoing statute provides that any peace officer or state parole officer may re-arrest a probationer without warrant or other process; furthermore, that the court may thereupon, in its discretion, without notice, revoke and terminate such probation. The statute further provides that suspended or deferred sentences may be summarily revoked, sentence imposed, judgment rendered, and the defendant delivered to the sheriff for transfer to the state penitentiary. While it is true that ·the revocation of probation does occur in court, and the function is performed by a judge of the superior court, there is nothing in the statute enacted by the legislature to require the observance and application of due process standards as to this facet of the administration of the

state probation system. We are not inclined, judicially to impose and to judicially assume responsibility for applying to probation those due process standards which unquestionably are applicable and must be observed in the more orthodox aspects of criminal law administration.

The position taken by the Supreme Court of Washington on the right to counsel of convicted defendants appearing before the courts in probation matters, is neither novel nor unique, for a respectable number of jurisdictions have decided this issue in substantially the same way as the Supreme Court of Washington in this case. One of the most recent of these cases is *Brown v. Warden, United States Penitentiary*, 351 F.2d 564 (CCA 7, 1965), Cert. den. 382 US 1028 in which case the court, in its decision, stated in part, as follows:

An offender's rights under the Federal Probation Act have been construed in Burns v. United States, 287 U.S. 216, 53 S.Ct. 154, 77 L.Ed. 266 (1932) and in Escoe v. Zerbst, 295 U.S. 490, 55 S.Ct. 818, 79 L.Ed. 1566 (1935). The act is intended to provide a period of grace in order to aid the rehabilitation of a penitent offender. Probation is conferred as a privilege and connot be demanded as a matter of right. The offender stands convicted and faces punishment. The source of his rights under the Federal Probation Act lies in the legislative mandate, not in the Constitution of the United States.

Congress has declared that a probationer accused of violating his probation "shall be taken before the court for the district having jurisdiction over him."

Section_3653, Title 18 U.S.C.A. Although no trial in any strict or formal sense is required, the legislative directive that the accused probationer shall be taken before a court means that—

"* * there shall be an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper."

Escoe v. Zerbst, 295 U.S., at 493, 55 S.Ct. at 820.

The inquiry of the court at such a hearing is not directed to the probationer's guilt or innocence in the underlying criminal prosecution, but to the truth of the accusation of a violation of probation. Has the probationer abused the privilege of the period of grace extended to him to aid him in rehabilitation?

Liberty on probation is conditioned on the observance of certain conduct. A breach of the required conduct—not necessarily the commission of a crime—constitutes a violation and serves to terminate the privilege of conditional liberty. Although revocation results in the deprivation of the probationer's liberty, the sentence he may be required to serve is the punishment for the

crime of which he had previously been found guilty.

Thus it appears that under the Federal Probation Act as construed by the Supreme Court, the source and nature of the offender's rights and the issue before the court on hearing of revocation of probation differ from those on imposition of sentence in a criminal prosecution. It follows that an offender who has already been adjudged guilty and sentenced is not entitled to counsel as a matter of right under the Sixth Amendment of the Constitution of the United States or under Rule 44 of the Federal Rules of Criminal Procedure in the hearing on revocation wherein it is determined whether or not he has forfeited. the privilege of conditional liberty. Welsh v. United States, 348 F.2d 885 (6th Cir. 1965): United States v. Huggins, 184 F.2d 866. 868 (7th Cir. 1950); Gillespie v. Hunter, 159 F.2d 410 (10th Cir. 1947); Bennett v. United States, 158 F.2d 412 (8th Cir. 1946). Decisions concerned with the constitutional right to counsel of an accused at various stages of criminal prosecutions are not controlling. Cf. Gideon & Wainwright, 372 US 335, 83 S.Ct. 792, 9 L. Ed. 2d 799 (1963); United States v. Tribote, 297 F.2d 598 (2d Cir. 1961).

Also see Crowe v. United States, 175 F.2d 799 (Ca. 4) Cert. den. 338 US, 950, Reh. den. 339 US 916; Richardson v. United States, 199 F. 2d 333 (Ca. 10); Shum v. Fogliani, 413 P.2d

495 (Nevada, 1966); People v. Wood, 2 McA 342, 139 N.W.2d. 895 (Mich., 1955.)

In the petitioner's case, it is undisputed that the petitioner was represented by counsel prior to, and at the time of pleading guilty to the crime of BUR-GLARY IN THE SECOND DEGREE as described in the criminal information. At the time of the entry of the plea of guilty by the petitioner, the "criminal prosecution" had come to an end and no appeal could be taken to the Supreme Court of Washington from a a conviction on a plea of guilty, at least insofar as it goes to the question of guilt or innocence. An appeal may be taken upon matters which are collateral to the conviction and go to the jurisdiction of the superior court. However, at the time of the entry of the plea of guilty, any errors or irregularities which' might be appealable should be known by the petitioner's counsel and it must be presumed that if there were such errors or irregularities, and most certainly, if they were of constitutional dimensions. counsel would have so advised the petitioner.

Following the entry of the plea of guilty by the petitioner to the crime of BURGLARY IN THE SECOND DEGREE, application was made to the Superior Court of the State of Washington for Thurston County for release from custody on probation. We submit, that at that time, the rights of the petitioner were derived from the State Probation Act (RCW 9.95.200-9.95.240) rather than the Constitution, probationary matters not being a part of

the "criminal prosecution". The Probation Act of Washington does not confer upon convicted defendants, a right to counsel at the time of the revocation of probation followed by the imposition of sentencing and such procedure does not do violence to the provisions of the Constitution.

WHEREFORE, the respondent respectfully submits that the application of WILLIAM EARL WALK-LING for a writ of certiorari to review the decision of the Supreme Court of the State of Washington should be denied.

Respectfully submitted,

JOHN J. O'CONNELL, Attorney General of the State of Washington,

STEPHEN C. WAY,
Assistant Attorney General,
Counsel for Respondent.

Office Supreme Court, U.S. F I L. E. D.

FEB 23 1967

JOHN F. DAVIS, CLERK

COURT OF THE UNITED STATES OCTOBER TERM, 1966

SUPREME COURT OF

IN THE

No. # 16

JERRY DOUGLAS MEMPA,

Petitioner,

vs.

B. J. RHAY, Superintendent, Washington State Penitentiary,

Respondent.

MOTION FOR LEAVE TO PROCEED FURTHER IN FORMA PAUPERIS

asks leave Affidavit in support of this Petition is attached hereto. The petifees the in further herein without prepayment of costs or Penitentiary, Walla Walla, Washington, Petitioner, Jerry Douglas Mempa, who is now held expenses, and to proceed in forma pauperis. Washington State to proceed printing tioner's

Donald A. Schmechel

Evan L. Schwab

Counsel for Petitioner 1405, 1411 Fourth Avenue Seattle, Washington 98101 IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 424

JERRY DOUGLAS MEMPA,

Petitioner,

48

B. J. RHAY, Superintendent, Washington State Penitentiary,

Respondent

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED FURTHER IN FORMA PAUPERIS

STATE OF WASHINGTON
COUNTY OF WALLA WALLA

depose say, in support of my application for leave to proceed further pay printing sworn, on oath to fees or I, JERRY DOUGLAS MEMPA, being first duly costs or to prepay without being required

- I am the petitioner in the above-entitled cause.
- of. the costs am unable to pay Because of my poverty I cause. said
- same. 3. I am unable to give security for the
- seek H redress the I am entitled to I believe that cause.
- by 5.. The \$100.00 docket fee herein was advanced Civil Liberties Union of Washington. American
- The nature of said-cause is briefly stated as follows: Court for Spokane County, Washington, following to the Washington State Penitentiary I was sentenced by the Superior

represented by counsel at the hearing when my probation status was hearing during which a deferred sentence previously imposed was indigency the denial of assistance of that I was deprived of federal during said hearing. This Court granted my petition for vacated, and sentence was This proceeding seeks review of the denial I filed with the Washington was not Notwithstanding my and the absence of a waiver of the right to counsel, I 1967 sentence was rights as a result of revoked, and sentence was entered. a petition for habeas corpus which Writ of Certiorari on February 13, on the ground revoked, the deferral of Supreme Court imposed forthwith. constitutional counsel

February, day Subscribed and sworn to before me

Notary Public in and for the State o Washington, residing at Walla Walla Office Supreme Court, U.S. F 1 L E D

FEB 23 1967

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1966

No. 424

JEERY DOUGLAS MEMPA,

Petitioner,

VS.

B. J. RHAY, Superintendent, Washington State Penitentiary,

Respondent.

MOTION TO APPOINT COUNSEL

Petitioner, Jerry Douglas Mempa, who is now held in the Washington State Penitentiary, Walla Walla, Washington, Court for an order appointing counsel herein.

After this Court granted Certiorari herein on February 1,3, If this Court will 1967, petitioner executed and filed a motion and affidavit for appoint counsel, petitioner respectfully requests that Evan L. Schwab, Esq., of 1411 Fourth Avenue, Seattle, Washington, be to serve, for the following reasons: leave to proceed further in forma pauperis. appointed so Evan L. Schwab is a member in good standing of the Washington University of Washington Law School in 1963, and then spent a year engaged in the private practice of law in Seattle, Washington He graduated with high honors from the Mr. Schwab has represented petitioner since the Washington Supreme Court denied the habeas corpus petition law clerk to Mr. Justice William O. Douglas. State Bar Association. since July, 1964. serving as

Mr. Schwab prepared the petition for writ of certiorari which was with all facets and he is completely familiar serving without pay. filed herein, 18

24, 1967, Mr. Schwab will have been a member of the State of Washington for a period of three years, and admission when this case is called during respects to petition for admission to the Bar of the United States Supreme Court. thereafter he will qualify in all Term, 1967. therefore seek formal On May the October Bar of the

Seattle, Washington WHEREFORE, petitioner prays that an Order be entered appointing Evan L. Schwab, Esq., of 1411 Fourth Avenue, serve as his counsel herein.

SS COUNTY OF WALLA WALLA STATE OF WASHINGTON

JERRY DOUGLAS MEMPA, being first duly sworn, on oath deposes and

That he is the petitioner in the above-entitled action; that he has read the foregoing Motion to Appoint Counsel, knows contents thereof, and believes the same to be true.

of me Subscribed and sworn to before February, Notary Public in and for the State of Washington, residing at Walla Wall

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Office-Supreme Court, U.S. F I L *E D

JUL 12 1967

IN THE SUPREME COURT OF THE UNITED STATES, DAVIS, CLERK

OCTOBER TERM, 1967.

Nos. 16 & 22

JERRY DOUGLAS MEMPA,

Petitioner,

B. J. Rhay, Superintendent, Washington State Penitentiary,

Respondent.

WILLIAM EARL WALKLING,

Petitioner,

B. J. Rhay, Superintendent, Washington State Penitentiary,

Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF OF PETITIONERS

Evan L. Schwab 1405, 1411 Fourth Avenue Seattle, Washington 98101

Attorney for Petitioners

Of Counsel

MICHAEL H. ROSEN

American Civil Liberties Union
of Washington
2101 Smith Tower
Seattle, Washington 98104

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IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1967

Nos. 16 & 22

JERRY DOUGLAS MEMPA,

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WILLIAM EARL WALKLING,

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B. J. Rhay, Superintendent, Washington -State Penitentiary,

Respondent.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF OF PETITIONERS

Opinions Below

A. Mempa v. Rhay:

The majority and dissenting opinions of the Washington State Supreme Court are reported in 68 Wn.2d 882, 416 P.2d 104 (1966). They are printed in the Record at pages 40-59. All references to the *Mempa* record are herein denoted as "M.R."

B. Walkling v. Rhay:

An opinion was not rendered in Walkling v. Rhay. The order of the Washington State Supreme Court is not reported, but is printed in the Record at pages 19-20. All references to the Walkling record are herein denoted as "W.R."

Jurisdiction

A. Mempa v. Rhay:

The opinion of the Court below was filed on June 23, 1966 (M.R. 40). In Washington, no separate judgment is entered. The petition for certiorari was filed on August 8, 1966, and certiorari was granted on February 13, 1967 (M.R. 62). The jurisdiction of this Court is invoked under 28 U.S.C., § 1257(3), because rights are claimed under the Constitution of the United States.

B. Walkling v. Rhay:

The order of the Court below was filed on October 18, 1966 (W.R. 19). The petition for certiorari was filed on October 31, 1966, and certiorari was granted on February 13, 1967 (W.R. 21). The jurisdiction of this Court is invoked under 28 U.S.C., § 1257(3), because rights are claimed under the Constitution of the United States.

Constitutional Provisions and Statutes Involved

The constitutional provisions involved are the Sixth Amendment,

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence,"

and Section 1 of the Fourteenth Amendment of the Constitution of the United States:

"... nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The statutory provisions involved are Chapter 155, § 1, p. 459, Laws of Washington, 1915, as amended by Chapter 64, § 1, p. 131, Laws of Washington, 1919 (RCW 9.54.020), Chapter 227, Sections 3, 4, 5 and 7, p. 890-92, Laws of Washington, 1957 (RCW 9.95.200, 9.95.210, 9.95.220 and 9.95.240) and Section 1057, Laws of Washington, 1881 (RCW 10.40.-175). They are reproduced in Appendix A of this brief.

Questions Presented

- 1. Does the Fourteenth Amendment confer a right to counsel during a state court probation revocation proceeding?
- 2. Does the Fourteenth Amendment confer a right to counsel at the sentencing and judgment stage of a state court criminal proceeding?

3. If such a right to counsel exists, and in the absence of waiver, must counsel be appointed for a defendant unable to employ counsel?

Statement of the Cases

A. Mempa v. Rhay:

Petitioner Jerry Douglas Mempa, who was then under 18 years of age, was apprehended by Spokane police on April 28, 1959, on the belief that he had participated in the taking of one or more automobiles without the permission of the owner (M.R. 13). He was placed in the custody of the Spokane Juvenile Detention Home (M.R. 13). On April 29, 1959, he escaped and, during his absence on escape—on May 1, 1959, the juvenile court entered an order relinquishing exclusive jurisdiction over petitioner (M.R. 13). The case was transferred to the prosecuting attorney of Spokane County, Washington, for prosecution under the provisions of the Criminal Code (M.R. 13). On May 18, 1959, the petitioner surrendered to the Sheriff of Spokane County, at which time he was accompanied by his stepfather (M.R. 13).

On May 26, 1959, an information (M.R. 8) was filed in the Superior Court for Spokane County, charging petitioner. Mempa with the crime of "violating section 9.54.020 of the Revised Code of Washington (RCW) commonly known as 'Joy Riding,'" in that petitioner did "without the permission of the owner or person entitled to possession thereof, intentionally take and drive away a motor vehicle, to wit: a 1956 Chevrolet automobile,"

Counsel was thereafter appointed (M.R. 13) to represent petitioner, and on June 17, 1959 (M.R. 9) he was arraigned

before the Spokane County Superior Court. He entered a plea of guilty to the "joy riding" charge (M.R. 10) and an Order of Probation (M.R. 20) was thereupon entered, placing him on probation for two years, and providing for thirty days confinement as a condition of probation. The imposition of sentence was deferred pursuant to the provisions of RCW 9.95.200 and 9.95.210, and petitioner was instructed to remain under the supervision of the State Parole Office.

Petitioner Mempa was seventeen years old when he pleaded guilty and was placed on probation. He had not completed the eighth grade, and since 1956—age 14—he had progressed through a variety of juvenile and mental institutions within the State of Washington, with a conflict of opinion between two of the facilities as to whether he was a psychopathic delinquent (M.R. 10-11). His first appearance in Superior Court arose out of the above-described offense (M.R. 11, 58).

Approximately four months after petitioner was placed on probation, the Spokane County Prosecutor's office moved to have his protection revoked on the ground that he had been involved in a burglary on September 15, 1959 (M.R. 22-23). Accordingly a hearing was held in the Spokane County Superior Court on October 23, 1959 (M.R. 24-28). Petitioner, still seventeen years old, was accompanied to the hearing by his stepfather (M.R. 24). He was not represented by counsel and the court made no inquiry concerning the appointed counsel who represented petitioner four months earlier. Petitioner was not advised of a right to counsel, and he was not asked if he wished to be represented by counsel (M.R. 24-27; 38). The Court asked petitioner if he had been involved in the alleged burglary, and

petitioner answered in the affirmative (M.R. 25). Following petitioner's admission, the Court heard testimony from William D. Weaver, a parole and probation officer, and the crucial portion of the proceedings went as follows (M.R. 26).

"THE COURT: Just make it short and sweet. You made the report in this connection and you state that the boy denied breaking into the place out there, wherever it was?

"A. That is correct.

"THE COURT: And he did so deny it?

. "A. Yes.

"THE COURT: All right, that's all. Hand up the order revoking the probation. I'm signing the order revoking the probation that I previously granted you. Now, stand up, Jerry. Probation having been revoked, it is the further judgment of the Court that you be confined in the Washington State Reformatory for a maximum period of ten (10) years."

Without affording petitioner an opportunity to cross-examine the witness or state anything in his own behalf, the court entered an Order revoking probation (M.R. 23). Judgment was entered upon the previous plea of guilty to "joy riding" and petitioner was sentenced to imprisonment for a maximum term of ten years (M.R. 33-34). Petitioner was not advised of his right to appeal, and no appeal was taken.

In 1965, petitioner Mempa filed a pro se petition for writ of habeas corpus (M.R. 1-4) with the Washington State Supreme Court. alleging that the judgment and sentence of October 23, 1959, was void because he had not been represented by counsel during the probation revocation hearing, nor at the time of sentencing. The petition for writ of habeas corpus relied upon the Washington State Constitution and the Sixth Amendment to the Constitution of the United States.

A comprehensive opinion was delivered by the en banc Washington State Supreme Court on June 23, 1966, denying the application for habeas corpus by a vote of six to three (M.R. 40-59).

The majority opinion states the issue in this fashion (M.R. 40-41):

"The basis of this petition for a writ of habeas corpus may be concisely described as follows: Jerry D. Mempa was not represented by counsel at the peremptory hearing in the Spokane Superior Court when (a) his probation status was revoked, (b) the deferral of sentence was vacated, and (c) its imposition took effect forthwith. Thus, the problem presented to us for decision is whether probationer Mempa was entitled to counsel and matter of constitutional right in relation to any one or all of the foregoing aspects of administration of the state probation system."

The petition for habeas corpus says judgment and sentence were entered on June 17, 1959. This is incorrect, as the record demonstrates (M.R. 34). Petitioner was pro se when the petition was filed, and he was mistaken about the dates.

^{*}Petitioner, being indigent, was not represented during the oral "argument" before the Washington State Supreme Court. One Assistant Attorney General "argued" both for the petitioner and for the respondent.

The Court's opinion is well summarized in this excert (M.R. 47-48):

"While probation is a modern innovation with much constructive potential in terms of the possible rehabilitation of criminal offenders, probation status, or the granting of it by the courts, is a matter of grace or privilege to be granted solely in the discretion of the courts. . . . We have previously held that there are no constitutional rights respecting the acquisition of probation status. And it is furthermore our reasoning that there are no constitutional rights involved in the termination or revocation of probationary status, or in respect to the concomitant operations of the superior courts involving imposition of either (1) suspended or (2) deferred sentences. The function involved, in terms of definitive action, is essentially quasi-administrative or plenary in nature. The operations are essentially no different from those performed administratively by the State Board of Prison Terms and Paroles or by the prison authorities in administering other phases of penal administration in the state of Washington."

The Court overruled prior cases conferring a right to counsel at the *imposition of sentence* following probation revocation (M.R. 47), specifically rejected the authority of Gideon v. Wainwright, 372 U.S. 335 (1963), and Escoe v. Zerbst, 295 U.S. 490 (1935), and concluded as follows (M.R. 49-50):

"No appeal, or a petition for writ of habeas corpus, will be successful in this court where the question is

whether the probationer was accorded his constitutional due process rights at the hearing. He simply has none."

B. Walkling v. Rhay:

On October 11, 1962, petitioner Walkling was charged by . information filed in the Superior Court of the State of Washington for Thurston County, in Cause No. C-2941, with having committed the crime of burglary in the second degree on or about September 19, 1962 (W.R. 11). On October 29, 1962, the petitioner was brought before the Superior Court for Thurston County for arraignment upon the information, at which time he was accompanied by an attorney, W. N. Beal (W.R. 13). The petitioner thereupon entered a plea of quilty to the crime charged in the information (W.R. 13). The court entered an Order deferring the imposition of sentence for a period of three years from October 29, 1962, and granted the petitioner probation under the supervision of the Board of Prison Terms and Paroles and, as a condition of such deferral, required petitioner to serve 90 days in jail and make restitution (W.R. 14).

On May 2, 1963, on the basis of the report that petitioner Walkling had violated the terms of his probation, the Thurston County Superior Court ordered the issuance of a bench warrant for his apprehension (W.R. 8).

On February 24, 1964, petitioner was arrested by the Sheriff of Lewis County, Washington, and an information was thereafter filed in Lewis County charging the petitioner with forgery in the first degree and grand larceny (W.R. 8).

On April 16, 1964, before further proceedings were had in Lewis County, the petitioner was transferred to Thurston County pursuant to the May 2, 1963, bench warrant (W.R. 8).

On May 12, 1964, petitioner Walkling was brought before the Thurston County Superior Court for hearing on the petition of the Prosecuting Attorney for an Order revoking probation. Petitioner then requested a continuance in order to secure the services of an attorney, and the matter was continued to May 18, 1964, at 9:00 A.M. (W.R. 15).

On May 18, 1964, at 9:00 A.M., the matter was again called for hearing, at which time petitioner Walkling was present in court without an attorney (W.R. 15). Petitioner advised the court that an attorney named Smith Troy was supposed to represent him (W.R. 15). The court held the matter in abeyance until 9:15 A.M., but proceeded then because no one had appeared for the petitioner (W.R. 15). The petitioner therefore appeared without counsel (W.R. 15), although he repeatedly requested the assistance of counsel (W.R. 2). The trial court judge, Raymond Clifford, now deceased, took the position in all such cases that there was no constitutional right to the appointment of counsel in probation revocation proceedings or during the sentencing which follows, and it was not Judge Clifford's practice to advise unrepresented defendants of a right to appointed counsel in such proceedings (W.R. 17-18). (The court below assumed for purposes of decision that petitioner was not advised of a right to the appointment of counsel at public expense (W.R. 19).)

The petition to revoke probation was read to the petitioner in open court, and a certified copy was served upon him. Clare Murray, a probation parole officer, was sworn and testified in regard to the fourteen separate counts of forgery and the fourteen separate counts of grand larceny filed against the petitioner subsequent to October 29, 1962. The court concluded that the order granting deferral of sentence and probation should be revoked, whereupon an order was so entered, and petitioner Walkling was sentenced to a term of confinement of not more than fifteen years upon his previous plea of guilty to the crime of burglary in the second degree (W.R. 15-16).

In June, 1966, petitioner filed a petition for writ of habeas corpus (W.R. 1-3) with the Washington State Supreme Court, alleging that the judgment and sentence of May 18, 1964, was void because he had not been represented by counsel during the probation revocation hearing, nor at the time of sentencing, despite his request for appointment of counsel. The petition for writ of habeas corpus specifically relied upon the Sixth and Fourteenth Amendments to the Constitution of the United States.

When the case was submitted to the court below, the briefs and oral argument were directed to the continued validity of the *Mempa* v. *Rhay* decision, which is the companion case herein. On October 18, 1966, the court below denied the application for habeas corpus, and stated (W.R. 20):

"The application of William Earl Walkling for writ of habeas corpus is controlled by this court's recent decision in *Mempa* v. *Rhay*, 68 W.D.2d 871 and his constitutional rights were not violated on the grounds alleged for the reasons assigned in the decision by this court in *Mempa* v. *Rhay*, supra."

On May 17, 1967 petitioner Walkling was released from the Washington State Penitentiary at Walla Walla. He is now in the "custody" of and subject to the supervision of the Washington State Board of Prison Terms and Paroles. Pursuant to stipulation of counsel, a motion has been filed herein for substitution as respondent of the Washington State Board of Prison Terms and Paroles. See, e.g., Jones v. Cunningham, 371 U.S. 236 (1963).

Summary of Argument

Completely disregarding the thrust of the Fourteenth Amendment as enunciated in cases like Gideon v. Wainwright, 372 U.S. 335 (1963), and Douglas v. California, 372 U.S. 353 (1963), the Washington State Supreme Court held that probationers do not have a right to counsel at revocation hearings, nor at the sentencing which follows, notwithstanding the threatened deprivation of their liberty and the imposition of a criminal judgment and sentence.

I.

A probation revocation proceeding is a critically significant stage in the proceeding against an accused, White v. Maryland, 373 U.S. 59 (1963), and the right to counsel in such a proceeding must be co-extensive with the basic right to counsel expressed in Gideon v. Wainwright, supra.

Characterization of a proceeding which may result in the deprivation of liberty as "quasi-administrative" or "civil" is insufficient to avoid the thrust of the Fourteenth Amendment. Kent v. United States, 383 U.S. 541 (1966); In re Gault, — U.S. — (May 15, 1967, 35 Law Week 4399); Smith v. Bennett, 365 U.S. 708 (1961). While the initial

granting of probation may be a "privilege" or a "favor," revocation of probation cannot be arbitrary, and must comply with due process of law. Cf. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

In the state of Washington, probation can only be revoked "for cause." A probationer who satisfactorily completes the terms of his probation can move to have his record cleared and civil liberties restored. His continued liberty is at stake when a probation revocation proceeding is convened. He has a need to be heard, and due process of law entitles him to counsel. *Powell* v. *Alabama*, 287 U.S. 45 (1932), and *In re Gault, supra*.

Only an attorney can effectively marshal the evidence, cross examine the opposing witnesses, and prepare a defense for the accused probationer. Only an attorney can effectively determine whether or not the accused's actions constitute sufficient cause for revocation, and only an attorney can adequately present matters in mitigation. Certain procedural rights are lost if not availed of during the probation revocation hearing, and only an attorney can be expected to advance these. Due process affords the right to counsel at such proceedings. White v. Maryland, supra; In re Gault, supra. Denial of counsel at such hearings is as unfair as denial was at trial, prior to Gideon v. Wainwright, supra.

The Equal Protection Clause of the Fourteenth Amendment also requires recognition of the right to counsel at probation revocation hearings. In the State of Washington, probation revocation hearings are held in open court, and the probationer has an opportunity to be heard. Retained counsel are permitted to appear. To condition

representation by counsel upon the probationer's affluence is an unconstitutional discrimination. Douglas v. California, supra.

H.

The lower court held that there is no right to counsel when, following revocation of probation, sentence is first imposed on the original criminal conviction. This also conflicts with the Due Process and Equal Protection clauses of the Fourteenth Amendment.

Townsend v. Burke, 334 U.S. 736 (1948), Gideon v. Wainwright, supra, and Moore v. Michigan, 355 U.S. 155 (1957), dictate that the right to counsel at sentencing, whether immediately following conviction or following a period of probation, is and must be co-extensive with the right to counsel at trial. The sentencing stage of the proceeding is as critical as the trial, and the assistance of counsel is constitutionally required. For example, motions to withdraw pleas of guilty can be made at this stage, matters in mitigation of sentence can be presented, objections can be made to illegal sentencing, and appeal rights may be involved.

In terms of equal protection, permitting the presence of retained counsel at sentencing while making the indigent fend for himself is an unconstitutional discrimination. Douglas v. California, supra.

III.

While neither petitioner specifically requested the appointment of counsel, this did not amount to a waiver, as the right to counsel does not depend upon a request. Carn-

ley v. Cochran, 369 U.S. 506 (1962). The lower court's theory that waiver might have occurred because probation was accepted on the basis of existing law is, in addition to being novel, patently insufficient to deprive this court of jurisdiction. N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958).

The petitioners were denied their constitutional right to counsel at the probation revocation hearings and sentencings, in violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment. The cases should be reversed and remanded in accordance with the opinion of this court.

Argument

Completely disregarding the thrust of the Fourteenth Amendment as enunciated in cases like Gideon v. Wainwright, 372 U.S. 335 (1963), and Douglas v. California, 372 U.S. 353 (1963), and with an anachronistic reliance upon the ancient concepts of "right-privilege" and "the chan-'cellor's grace," the Washington Supreme Court held that the petitioners did not have a constitutional right to counsel when they were peremptorily hailed into a judicial hearing at which the stakes included their liberty, reputation, future record, appellate remedies and when, for the first time, sentence was to be imposed upon a criminal charge. The lower court reached its decision notwithstanding the fact that the proceedings against the petitioners were as critically significant in a constitutional sense as the proceedings involved in White v. Maryland, 373 U.S. 59 (1963). and Hamilton v. Alabama, 368 U.S. 52 (1961).

Recent decisions of this Court established the right to counsel at various stages of the proceedings against an ac-

cused. See, e.g., Gideon v. Wainwright, supra; Douglas v. California, supra; Escobedo v. Illinois, 378 U.S. 478 (1964); Miranda v. Arizona, 384 U.S. 436 (1966); Kent v. United States, 383 U.S. 541 (1966), and In re Gault, — U.S. — (May 15, 1967, 35 Law Week 4399). Unfortunately, one gap remains—the area Professor Sanford A. Kadish has labelled "Peno-Correctional" in his article, The Advocate and the Expert-Counsel in the Peno-Correctional Process, 45 Minn. L. Rev. 803 (1961) (hereinafter cited "Kadish, supra"). The present cases clearly present the issue of one's right to counsel during a single phase of the "peno-correctional" gap-proceedings occurring after conviction, following a trial or plea of guilty, and before but including the time judgment and sentence are entered (as distinguished from post-conviction proceedings such as parole). We submit that the Due Process and Equal Protection clauses of the Fourteenth Amendment, as construed by this Court, confer a right to counsel at probation revocation proceedings and at the sentencing which follows, and that counsel must be appointed for indigents.

I.

The Fourteenth Amendment Confers a Right to Counsel During Probation Revocation Proceedings.

In dealing with the right to counsel under the Fourteenth Amendment to the United States Constitution, both the Due Process and Equal Protection clauses afford individually sufficient grounds for granting the relief sought by petitioners. For the Court's convenience, the following argument deals separately with each clause.

A. DUE PROCESS OF LAW AFFORDS A RIGHT TO COUNSEL DURING PROBATION REVOCATION PROCEEDINGS.

Our position can be briefly stated: The right to counsel at probation revocation proceedings is, and must be, co-extensive with the right to counsel as established in *Gideon* v. Wainwright, 372 U.S. 335 (1963). The following statement from *Gideon* v. Wainwright is just as relevant to probation revocation hearings as to criminal trials (372 U.S., at 344):

"[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crimes, few indeed, who fail to hire the best lawyers the can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries . . . From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if

the poor man charged with crime has to face his accusers without a lawyer to assist him."

The Washington State Supreme Court attempted to avoid the thrust of Gideon by characterizing probation revocation hearings as essentially "quasi-administrative" in nature, stating that "the operations are essentially no different from those performed administratively by the State Board of Prison Terms and Paroles or by prison authorities in administering other phases of penal administration in the State of Washington (M.R. 48)." The Court said probation status "is a matter of grace or privilege to be granted solely in the discretion of the courts," and "there are no constitutional rights respecting the acquisition of probation status (M.R. 47)."

Implicit in the approach taken by the Washington court is the notion that probation revocation proceedings are not "criminal prosecutions" within the Sixth and Fourteenth Amendments. This is also the essence of the respondent's argument. Since such proceedings are not "criminal prosecutions," it is argued, there is no right to counsel at such hearings (nor any other due process rights so far as the court below is concerned—M.R. 49-50). This approach, in addition to simply being wrong, is an example of misplaced and illogical reliance on labels.

A state court's characterization of a proceeding as "civil," "criminal" or even "quasi-administrative" is not sufficient to avoid the thrust of the Fourteenth Amendment. Kent v. United States, 383 U.S. 541 (1966), and In re Gault, — U.S. — (May 15, 1967), clearly rejected the "civil" v. "criminal" test in juvenile court cases presenting right to

counsel issues, and, as stated in Smith v. Bennett, 365 U.S. 708, 712 (1961), which dealt with a habeas corpus filing fee:

"We shall not quibble as to whether in this context it be called a civil or criminal action . . . The availability of a procedure to regain liberty lost through criminal processes cannot be made contingent upon the choice of labels."

In any event, we submit that the proceedings gainst the petitioners were clearly criminal in nature. Obviously, no one is arguing that they were civil proceedings. The purpose of the hearing, held in open court with a prosecutor and a judge, was to pass on the petitioners' continued eligibility for freedom—should they be sent to jail or not, and what should be their sentence for "joy-riding" and larceny, respectively. What could be more clearly "criminal"?

Turning then to the next basis for the decision below, one can acknowledge that the original order granting probation may have been a "privilege," a "favor" or an exercise of the "chancellor's grace," but it does not follow that no rights surround its revocation. Cf. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) (admission to the Bar); Slochower v. Board of Education, 350 U.S. 551 (1956) (public employment). Professor Kadish has forcefully met this "common justification for the ostracism of the law and the lawyer":

"While the argument is repeatedly made, generally in supporting a denial of legal processes against constitutional attack, it is hard to believe that anyone really believes it. First of all, even if it is solely

the quality of mercy which is being dispensed, it is apparent that it is not a personal act of grace by a reigning monarch, but a highly institutionalized system administered to tens of thousands of offenders each year by hundreds of governmental officials. So administered in a democratic community, even grace itself . . . must be dispensed and withdrawn according to some sense of principle and order and with some respect for the forms of procedural regularity associated with concepts of basic fairness. But more significantly [parole and probation], . . . are not remotely charity, but an integral part of our system of criminal law and as such can hardly be viewed as being properly administered outside the framework of the legal order appropriate to other laws." Kadish, supra, at 826-27.

Regardless of the label placed on the order granting probation, the fact remains that the recipient of a deferred sentence is ordinarily permitted to return to his community, his family and his job, subject only to behavioral restrictions and conditions arising out of his probationary status. As stated by the dissenting judge in the lower court, "In a very realistic sense he is free, for his personal liberty is but slightly restricted (M.R. 51)."

In the State of Washington, probationary status may be revoked only if the court finds that the probationer is "violating the terms of his probation, or engaging in criminal practices, or is abandoned to improper associates, or living a vicious life." RCW 9.95.220. In other words, for "cause." Furthermore, the probationer is accorded the right, after a successful probationary period, to come be-

fore the court and petition for a negation of his conviction and dismissal of the charges. RCW 9.95.240. He may thus clear his record and remove outstanding penalties and civil disabilities. These are substantial and fundamental rights, and, as stated by the dissenting opinion below, "should not be subject to nullification by the whim of peremptory 'quasi-administrative' proceedings which do not even afford the right to be represented by counsel at the time of entering the nullifying judgment and sentence (M.R. 52)."

Of primary significance, a probation revocation hearing is convened, among other things, to pass upon the question of the probationer's continued *liberty*. As stated in Note, Legal Aspects of Probation Revocation, 59 Colum. L. Rev. 311, 325-26 (1959):

"[T]he freedom of action which a probationer enjoys prior to revocation is sufficiently extensive that it should be considered 'liberty' within the meaning of a due process clause, either by viewing the granting of probation as a restoration of a part of the liberty of which the offender had duly been deprived by his conviction and by then viewing the revocation of probation as a deprivation of his restored liberty, or by theorizing that the offender was deprived of only part of his liberty when his conviction resulted in his being put on probation and that incarceration upon revocation of probation represents a further deprivation of liberty."

Since a child is constitutionally entitled to counsel in a proceeding to determine if he is a "delinquent" and is to be "subjected to the loss of his liberty," In re Gault, supra, at

—, the adult probationer must also be entitled to counsel in a proceeding wherein his liberty is at stake.

A probation revocation hearing is obviously a time when a defendant wishes and needs to be heard, and when due process must protect his right to be heard. As stated by Mr. Justice Sutherland in *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932):

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law He requires the guiding hand of counsel at every step in the proceedings against him."

Some have made the argument that an attorney is not "necessary" at probation revocation proceedings, that probation officers "lean over backwards" for the probationer, and that the judge and prosecutor amply protect a man who "has had enough 'breaks' already." Kamisar and Cooper, The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations, 48 Minn. L. Rev. 1, 100 (1963) (hereinafter cited "Kamisar, supra"). [A similar argument was advanced concerning juvenile court proceedings, and was rejected forcefully in In re Gault, supra.]

Is an attorney "necessary"? What can he do at the hearing? First of all, issues of fact may be involved. The probationer is usually in jail after the revocation proceeding is commenced. Only a lawyer can effectively marshal the evidence, cross-examine opposing witnesses, be they lay people or probation officers, and put together a defense.

If the alleged violation is admitted by the defendant, a determination must be made as to whether that particular occurrence, malfeasance or nonfeasance constitutes statutory "cause" for revoking probation. Has the state complied with its burden of proof? Has the accused engaged in proscribed conduct sufficiently serious to warrant revocation of probation? Assuming that issues of fact are resolved against the accused, and the court concludes that requisite "cause" exists for revocation of probation, the question still remains—should probation be revoked. An attorney is obviously better equipped than the accused to argue mitigating circumstances in an attempt to dissuade the judge from revoking probation. As stated by a district court judge:

"After all, we provide an attorney for sentencing, even though there is no doubt about the man's guilt. So here, even if there is a violation, the disposition is crucial. There are many things I can do short of sending the probationer back to prison. I might feel that something less than commitment to prison is called for, that, for example, sending him to a work farm for a few months is sufficient under the circumstances. A lawyer, a spokesman, can be helpful in this connection." Kamisar, supra, at 101.

The basic need for counsel is well summarized by Professor Kadish:

"[T]he determination to revoke and recommit because of conduct in violation of the conditions on which release was granted, involves, if not exclusively, then at least centrally, the fairly narrowly focused issue of what the conduct of the releasee actually was and

whether it constituted a violation of a stated condition, entitling the court or agency to consider whether revocation is thereby indicated. Given the character of the issue to be determined and the fact that the continued liberty of a person depends on the outcome, it is difficult to understand the view sometimes expressed that a lawyer has no proper business in these matters. The central task of ascertaining whether the prisoner has committed the acts alleged, and measuring the acts proven against a standard to which he was obliged to conform is precisely the business of the criminal trial itself where the right to the assistance of counsel has been recognized as one of the 'immutable principles of justice.' Indeed, in many contested revocation proceedings, the conduct charged actually constitutes the commission of a criminal act. No doubt it is simpler and faster for a court or a board to make the determination by whatever means seem to it sufficient to persuade—whether it be an informal talk with the parole officer or a brief interview with the prisoner or a written report by an investigator. But it would seem patently at war with the central concept of procedural justice to deny to a person with his liberty at stake the opportunity to hear and meet the specific charge against him with the benefit of counsel." Kadish, supra, at 833.

In the procedural vein, a probation revocation hearing is a point at which Washington probationers can still move to withdraw an original plea of guilty. RCW 10.40.175; State v. Farmer, 39 Wn.2d 675, 237 P.2d 734 (1951); State v. Shannon, 60 Wn.2d 883, 376 P.2d 646 (1962). Can we

really expect the unrepresented probationer to even guess that this motion can be made?

The right to counsel at a probation revocation hearing must not be conditioned upon the existence of a fact dispute, i.e., upon denial of the alleged violation by the probationer. The decision to admit or deny the violation is crucial, and requires the advice of counsel. Cf. Miranda v. Arizona, 384 U.S. 436 (1966). For example, the petitioner in Mempa v. Rhay denied the probation violation when he was first taken into custody (M.R. 26). But he admitted it when he appeared at the hearing without counsel (M.R. 25). Would he have surrendered—confessed—as quickly if he had had a lawyer? Perhaps, but perhaps not—the decision cannot be made intelligently without consulting an attorney.

We submit that a probation revocation hearing is a "critically important" phase in the overall criminal proceeding against an accused. As stated in *Kent* v. *United States*, 383 U.S. 541, 554 (1966):

"There is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons."

In Kent v. United States, the Court referred to the "critically important" question of whether a child should be deprived of the special protection and provisions of the juvenile court act, and it brushed aside the issue of whether juvenile proceedings are civil or criminal in nature. See also In re Gault, — U.S. — (May 15, 1967). Probation revocation proceedings are as critical as the juvenile court proceedings in Kent v. United States and In re Gault, the preliminary hearing in White v. Maryland, 373 U.S. 59

(1963), and the arraignment in Hamilton v. Alabama, 368 U.S. 52 (1961).

A "red herring" must be disposed of. Throughout the lower court's opinion runs the fear that it is impossible to grant the procedural safeguards sought by the petitioners without defeating the purposes of the probation system. But in Washington, as will be pointed out later, it is common practice to admit the appearance in probation revocation proceedings of retained counsel. It cannot really be argued that assigned counsel—but not retained counsel—would impede the revocation proceedings or conflict with the goals of the system.

Unfortunately, most federal courts in this country have not recognized the right to counsel at probation revocation proceedings. Much of this can be traced to dicta used by Mr. Justice Cardozo in Escoe v. Zerbst, 295 U.S. 490, 492 (1935), to the effect that "probation or suspension of sentence comes as an act of grace to one convicted of a crime," and that the Constitution does not require notice or hearing on revocation of the "favor." And see Burns v. United States, 287 U.S. 216 (1932). The result in Escoe v. Zerbst, fortunately, was not as bad as it might seem, for the case goes on to hold that the federal probation statute requires:

"... such notice and hearing as will 'enable an accused probationer to explain away the accusation.' While this does not require 'a trial in any strict or formal sense,' it does require 'an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper.' [295 U.S., at 492]" Kadish, supra, at 815.

That case, moreover, did not involve the issue of the appointment of counsel, and it preceded Gideon v. Wainwright, supra.

The federal court approach in this area is typified by Brown v. Warden, 351 F.2d 564 (7th Cir. 1965), and the cases cited therein.3 But the right to counsel during a probation revocation hearing was recognized in United States ex rel. Harton v. Wilkins, 342 F.2d 529 (2nd Cir. 1965), although the decision was based primarily upon Pennsylvania law. State courts go both ways, with many refusing to recognize the right, while others do recognize it. Kadish, supra, at 816; Note, Legal Aspects of Probation Revocation, 59 Colum. L. Rev. 311, 328-330 (1959). And see Commonwealth ex rel. Remeriez v. Maroney, 415 Pa. 534, 204 A.2d 450 (1964) (hearing to revoke probation and impose sentence is a "critical stage" in the proceedings and right to counsel exists, citing Gideon v. Wainwright, supra, and White v. Maryland, supra); and Hoffman v. Alaska, 404 P.2d 644 (1965) (denial of counsel to an indigent probationer violates the Equal Protection Clause of the Fourteenth Amendment, citing Griffith v. Illinois, 351 U.S. 12 (1956)).4

³ Many of the federal cases deal with probation after the imposition of sentence, and are therefore distinguishable from this case. See, e.g., Brown v. Warden, supra.

^{*}A survey was taken of trial court judges in the six largest Washington State counties (Cowlitz, King, Kitsap, Kittitas, Spokane-and Yakima). Most of the judges responded that they do not appoint counsel for probation revocation hearings, "however, some of those who do not appoint counsel have some qualms about the fact that they have not done so." Amandes and Stevens, The Defense of Indigent Persons Accused of Crime in Washington—A Survey, 40 Wash. L. Rev. 78, 85 (1965).

We submit that it is manifestly as unfair to deny counsel at probation revocation hearings as it was, prior to-Gideon v. Wainwright, to deny counsel at the actual criminal trial. Mr. Justice Black's statement in Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938) is as applicable to probation revocation hearings as to a trial on the merits:

"[The conclusion that an unrepresented defendant cannot adequately advocate his right rests upon] the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is represented by experienced and learned counsel."

In summary, we submit that the due process concepts enunciated by this court in Gideon v. Wainwright, supra, and In re Gault, supra, are dispositive of these cases. The probation revocation hearing "must measure up to the essentials of due process and fair treatment," In re Gault, supra, at —, thereby requiring recognition of the right to counsel:

"Under our constitution, the condition of being a . . . [probationer] does not justify a kangaroo court." In re Gault, supra, at —.

B. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH
AMENDMENT REQUIRES THE APPOINTMENT OF COUNSEL
FOR INDIGENT PROBATIONERS.

The Washington statutes dealing with probation and probation revocation, i.e., RCW 9.95.200 through RCW 9.95.240, do not expressly provide that probationers may use retained counsel during revocation hearings. Likewise, the

decisions of the Washington Supreme Court are devoid of such a requirement. The fact remains, however, as the respondent will undoubtedly admit, that virtually all Superior Court Judges within the State of Washington permit the appearance of retained counsel in such hearings, and no case has come to our attention in which a Superior Court Judge ordered retained counsel out of the room. As stated by Judge Hamilton, dissenting, in the court below:

"As a practical and realistic matter, those probationers who can afford counsel will be afforded the opportunity of having counsel at their side throughout the proceeding. It would, indeed, be the rare Superior Court Judge who would deny them such a privilege." (M.R. 57)

We also wish to call the Court's attention to the affidavit of Harold R. Koch (W.R. 17-18). Mr. Koch was the Deputy Prosecuting Attorney who appeared against petitioner Walkling when his probation revocation hearing was convened. Mr. Koch's affidavit points out that Raymond W. Clifford, the Judge before whom that matter was called, had a practice in all probation revocation proceedings of refusing to appoint counsel, although he did permit the appearance of retained counsel for those who could afford them, and he was always willing to grant reasonable continuances for the benefit of retained counsel.

Although RCW 9.95.220 provides that probation may be revoked "without notice," the statute also provides that a probationer who is arrested and charged with violating the terms of his probation shall be "brought before the courts.

wherein the probation was granted." A judicial hearing is consequently required.

As to whether or not the probationer shall be given an opportunity to speak in such hearings, this language in the opinion of the court below settles the issue (M.R. 49):

"In all fairness to the probationer—and consonant with regular and orderly court procedure—we would anticipate that probationers should and will be given an opportunity to present their side of the story to the court respecting reported violations of the terms or conditions of probation."

In light of the foregoing, we believe it can be said that the general practice in the State of Washington is to allow the appearance of retained counsel at probation revocation hearings. The probationer will be brought into court upon the alleged violation, he will be given an opportunity to be heard, and, if sufficiently affluent, he may be represented by retained counsel. But the indigent probationer must fend for himself. The clash with the Equal Protection Clause of the Fourteenth Amendment is obvious. To paraphrase this Court's language in Douglas v. California, 372 U.S. 353, 355-58 (1963):

There can be no equal justice where the kind of revocation hearing a probationer receives depends on the amount of money he has; if the probationer with sufficient funds can make the court listen to argument by counsel, the poor probationer must not be forced to shift for himself. The practice in Washington manifests the policy that a probationer facing revocation be given an opportunity to be heard. But the indigent, where the fact situation is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful hearing.

See Kamisar, supra, at 96. See also Griffin v. Illinois, 351 U.S. 12 (1956), and Baxstrom v. Herold, 383-U.S. 107 (1966).

The decision of the court below has obviously created discrimination between probationers who can afford counsel and those who cannot. As stated by the dissenting opinion below (M.R. 57): "Due process and equal protection prohibit the accident of economic ability from being a criterion for right to counsel."

II

The Fourteenth Amendment Confers a Right to Counsel at the Sentencing Stage of Every Criminal Prosecution.

The court below has made the surprising pronouncement that a defendant does not have a federal constitutional right to be represented by counsel when, following a plea of guilty and the revocation of probation, he for the first time is sentenced on the criminal charge. (The lower'court's opinion applies equally to those situations where probation follows a contested trial rather than a plea of guilty.) That ruling departs from prior decisions of this Court and from most decisions within the United States. The sentencing which follows the revocation of probation represents the imposition of judgment and sentence on the original criminal charge, and, we submit, is as much a part of the criminal prosecution against the accused as the original trial, and the sentencing which usually occurs shortly after conviction. As such, this stage of the proceeding against the accused is clearly a part of the "criminal prosecution" referred to in

the Sixth Amendment, which is made obligatory upon the states by the Fourteenth Amendment to the Constitution of the United States.

A. DUE PROCESS OF LAW AFFORDS A RIGHT TO COUNSEL DURING THE SENTENCING STAGE OF ALL CRIMINAL PROSECUTIONS, INCLUDING THE SENTENCING WHICH FOLLOWS
REVOCATION OF PROBATION.

Although this Court has not squarely passed on whether the right to counsel in the federal or state courts under the Sixth and Fourteenth Amendments, respectively, extends to the sentencing stage, thereby obliging the appointment of counsel for indigents, "it has on several occasions recognized the 'invaluable aid' that a lawyer can render at this stage in ealling the court's attention to mitigating circumstances which might result in a lighter penalty." Kadish, supra, at 807. See, e.g., Von Moltke v. Gillies, 332 U.S. 708, 721 (1948); Carter v. Illinois, 329 U.S. 173, 178-79 (1946).

Perhaps the most significant and relevant decision of this Court on the issue of the right to counsel at sentencing is Townsend v. Burke, 334 U.S. 736 (1948). In that case, the petitioner pleaded guilty to non-capital offenses, and subsequently he asserted a violation of due process in the acceptance of his plea and the imposition of sentence without being advised of his right to counsel. This Court noted elements of substantial prejudice which the presence of counsel would have prevented. Accordingly, a due process violation was found. The significant aspect of Townsend v. Burke is that the test employed in assessing the petitioner's constitutional claim was substantially similar to the test this Court used in assessing right to counsel claims under Betts v. Brady, 316 U.S. 455 (1942). But Gideon v.

Wainwright, supra, overruled Betts v. Brady. In Townsend v. Burke, supra, the Court appears to have equated the right to counsel at the sentencing stage with the right at the trial itself. (Accordingly, Gideon v. Wainwright, supra, renders lack of counsel at the sentencing stage as conclusively "prejudicial" or "unfair" as lack of counsel at the trial. See, Kadish, supra, at 806; and Kamisar, supra, at 100.

Equally significant is Moore v. Michigan, 355 U.S. 155 (1957), where this court referred to a right to counsel during the stage of criminal proceedings to determine the degree of murder, and said, at 355 U.S. 160:

"The right to counsel is not a right confined to representation during the trial on the merits."

Even if the Court feels that Townsend v. Burke, Gideon v. Wainwright and Moore v. Michigan do not settle the issue, overwhelming reasons dictate why this Court should clearly rule that sentencing is a "critical stage" of a criminal prosecution, creating rights to counsel as extensive as those required at trial under Gideon v. Wainwright, supra. It is easy to demonstrate that sentencing in Washington is indeed. as "critical" a function as the trial itself. For example, a motion to withdraw a plea of guilty can be made any time before judgment and sentence are entered. RCW 10.40.175; State v. Shannon, 60 Wn.2d 883, 376 P.2d 646 (1962); State v. Farmer, 39 Wn.2d 675, 237 P.2d 734 (1951). The motion is addressed to the discretion of the trial judge, and it must not be denied where it is evident that the ends of justice will be served by permitting entry of a plea of not guilty. State v. McDowall, 197 Wash. 323, 85 P.2d 660 (1938); State v. Rose, 42 Wn.2d 509, 256 P.2d 493 (1953). . This is the stage at which matters in mitigation of sentence

can be presented, and objections raised to illegal sentences. Furthermore, where sentencing is deferred and a defendant is placed upon probation, a final judgment has not been entered, and an appeal may not be taken until probation is revoked and sentence imposed. State v. Farmer, supra. While few issues are available on appeal following a plea of guilty, the rule announced by the court below applies equally to the situation in which probation is granted following à trial. A probationer being sentenced needs advice concerning his appeal rights as much as he would if he were sentenced immediately following conviction or a plea of guilty.

The vital need for a lawyer at this critical stage of a criminal proceeding was well summarized by Judge Russell in *Martin* v. *U.S.*, 182 F.2d 225, 227 (5th Cir. 1950):

"There is then a real need for counsel... Then is the opportunity afforded for presentation to the Court of facts in extenuation of the offense, or in explanation of the defendant's conduct; to correct any errors or mistakes in reports of the defendants' past record; and, in short, to appeal to the equity of the Court in its administration and enforcement of penal laws. Any Judge with trial Court experience must acknowledge that such disclosures frequently result in mitigation, or even suspension, of penalty."

Sentencing judges operate in a large area of discretion and doubt. This augments the need for counsel. Carter v.

This rule was recently modified. An appeal is now permitted following a contested trial even though sentencing is deferred and probation is granted. However, this is permissible only if probation is conditioned upon a fine or serving time in jail, and review is limited to claimed trial error. State v. Proctor, 68 Wn.2d 817, 415 P.2d 634 (1966).

Illinois, 329 U.S. 173, 178 (1946). The court is no longer focusing its attention on past behavior. Now, society, through the court, turns its attention to considerations of retribution, community reassurance, reformation and deterrence—areas in which the average judge needs and welcomes assistance. One cannot deny the vital need for counsel at this stage; nor the unfairness of not permitting the defendant to effectively participate in these weighty decisions. See Kamisar, supra, at 101; and Kadish, supra, at 830.

The lower federal courts' interpretation of the right to counsel at sentencing has not been consistent. See, e.g., Kadish, supra, at 808,809 fn. 15-20. The issue was squarely presented, and decided in favor of the right to counsel, in Stidham v. Swope, 82 F. Supp. 931 (N.D. Calif. 1949). Language in other federal decisions seems to indicate that a constitutional violation would be found were the issues squarely presented. See, e.g. Gadsden v. U.S., 223 F.2d 627 (D.C. Cir. 1955), and Walton v. U.S., 202 F.2d 18 (D.C. Cir. 1953).

Recognition of the right to counsel at sentencing in the state courts has been less even. But, of course, most of the state decisions were rendered against a backdrop of pre-Gideon v. Wainwright reliance on tests established under Betts v. Brady; supra. See, e.g., Kadish, supra, at 809-812. As Professor Kadish's discussion points out, however, most of the courts started from the premise that the right to counsel at sentencing is co-extensive with the right to counsel at trial. This Court should so state.

B. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THE APPOINTMENT OF COUNSEL FOR INDIGENTS AT THE SENTENCING STAGE.

Our previous equal protection argament concerning probation revocation is equally applicable here. Furthermore, on page 21 of the brief which the respondent submitted to the court below in connection with petitioner Walkling (unprinted portion of Walkling record, p. 26), it is stated: "It is clear that a defendant of means can have counsel beside him at . . [sentencing]." To condition the right to counsel at this critical stage of the criminal proceeding upon the defendant's affluence is discrimination, and denies the indigent defendant equal protection of the law. Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

III.

The Petitioners Did Not Waive Their Right to Counsel.

The record does not conclusively show that either petitioner specifically requested representation by or appointment of counsel during his revocation hearing or at the time of sentencing. But as stated in Carnley v. Cochran, 369 U.S. 506, 513 (1962), "[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." See Miranda v. Arizona, 384 U.S. 436 (1966). Furthermore, petitioner Mempa was then seventeen years old (M.R. 13), and his limited education and background mitigated against a knowledge waiver. See Johnson v. Zerbst, 304 U.S. 458 (1938). Finally, the opinion and order of the court below in Mempa v. Rhay and Walkling v. Rhay, re-

spectively, deal only with the merits, and say nothing about waiver from the failure to request counsel.

The court below does seem to indicate in its Mempa v. Rhay opinion (M.R. 48) that waiver might have occurred because petitioner Mempa pleaded guilty and accepted probationary status on the basis of the existing statutes, which, the court said, do not confer a right to counsel. This novel waiver theory is patently insufficient to deprive this Court of jurisdiction Cf. N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958); and Fay v. Noia, 372 U.S. 391 (1963). As stated by Judge Hamilton, dissenting, in the court below (M.R. 58):

"Aside from the fact that it is extremely doubtful that any such theory of waiver was fully explained to petitioner at the time of the entry of the order of deferred sentence, the harshness and rigidity of the position taken by the majority is but emphasized by the facts appearing in this case... [The dissent discusses Petitioner Mempa's age and background.] Against this background, even the attorney general expresses some doubt as to petitioner's ability to fully comprehend the nature of his situation at the time of the revocation hearing. And, under the circumstances, it would be somewhat of a strain, to say the least, to assume that he fully appreciated all ramifications of the order of

The court below was saying so in Mempa v. Rhay for the first time as to the sentencing stage of the proceedings. McClintock v. Rhay, 52 Wn.2d 615, 328 P.2d 369 (1958), field sentencing to be part of a criminal proceeding, requiring the appointment of counsel. The McClintock case, which preceded petitioner's plea of guilty, was overruled in Mempa (M.R. 47). In fact, the trial court ignored McClintock in imposing sentence without appointing counsel.

deferred sentence and at the time of entry of that order knowingly, intelligently and competently waived all constitutional rights with respect to subsequent proceedings. Johnson v. Zerbst, 304 U.S. 458... (1938)."

Conclusion

For the reasons stated, it is respectfully submitted that the lower court erred, and that the petitioners were denied their right to counsel at the probation revocation hearings and sentencings, in violation of the provisions of the Fourteenth Amendment to the United States Constitution. The cases should be reversed and remanded, for further proceedings in accordance with the opinion of the Court, and issuance of the writs of habeas corpus.

Respectfully submitted,

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APPENDIX A

Statutes Involved

Revised Code of Washington (RCW):

9.54.020 Taking motor vehicle without permission. Every person who shall without the permission of the owner or person entitled to the possession thereof intentionally take or drive away any automobile or motor vehicle, whether propelled by steam, electricity or internal combustion engine, the property of another, shall be deemed guilty of a felony, and every person voluntarily riding in or upon said automobile or motor vehicle with knowledge, of the fact that the same was unlawfully taken shall be equally guilty with the person taking or driving said automobile or motor vehicle and shall be deemed guilty of a felony.

9.95.200 Probation by court—Board to investigate. After conviction by plea or verdict of guilty of any crime, the court upon application or its own motion, may summarily grant or deny probation, or at a subsequent time fixed may hear and determine, in the presence of the defendant, the matter of probation of the defendant, and the conditions of such probation, if granted. The court may, in its discretion, prior to the hearing on the granting of probation refer the matter to the board of prison terms and paroles or such officers as the board may designate for investigation and report to the court at a specified time, upon the circumstances surrounding the crime and concerning the defendant, his proper record, and his family surroundings and environment. In case there are no regularly employed parole officers working under the supervision of the board of prison terms and paroles in the county or counties wherein the defendant is convicted by plea or verdict of guilty, the court may, in its discretion, refer the matter to the prosecuting attorney or sheriff of the county for investigation and report.

9.95.210 Conditions may be imposed on probation. The court in granting probation, may suspend the imposing or

the execution of the sentence and may direct that such suspension may continue for such period of time, not exceeding the maximum term of sentence, except as hereinafter set forth and upon such terms and conditions as it shall determine.

The court in the order granting probation and as a condition thereof, may in its discretion imprison the defendant in the county jail for a period not exceeding one year or may fine defendant any sum not exceeding one thousand dollars plus the costs of the action, and may in connection with such probation impose both imprisonment in the county jail and fine and court costs. The court may also require the defendant to make such monetary payments, on such terms as it deems appropriate under the circumstances, as are necessary (1) to comply with any order of the court for the payment of family support, (2) to make restitution to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question, and (3) to pay such fine as may be imposed, and court costs, including reimbursement of the state for costs of extradition if return to this state by extradition was required, and may require bonds for the faithful observance of any and all conditions imposed in the probation. The court shall order the probationer to report to the board of prison terms and paroles or such officer as the board may designate and as a condition of said probation to follow implicitly the instructions of the board of prison terms and paroles. The board of prison terms and paroles will promulgate rules and regulations for the conduct of such person during the term of his probation.

9.95.220 Violation of probation — Rearrest — Imprisonment. Whenever the state parole officer or other officer under whose supervision the probationer has been placed shall have reason to believe such probationer is violating the terms of his probation, or engaging in criminal practices, or is abandoned to improper associates, or living a vicious life, he shall cause the probationer to be brought before the court wherein the probation was granted. For this purpose

any peace officer or state parole officer may rearrest any such person without warrant or other process. The court may thereupon in its discretion without notice revoke and terminate such probation. In the event the judgment has been pronounced by the court and the execution thereof suspended, the court may revoke such suspension, whereupon the judgment shall be in full force and effect, and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory as the case may be. If the judgment has not been pronounced, the court shall pronounce judgment after such revocation of probation and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory, in accordance with the sentence imposed.

. 9.95,240 Dismissal of information or indictment after probation completed. Every defendant who has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to . the termination of the period thereof, may at any time prior to the expiration of the maximum period of punishment for the offense for which he has been convicted be permitted in the discretion of the court to withdraw his plea of guilty and enter a plea of not guilty, or if he has been convicted after a plea of not guilty, the court may in its discretion set aside the verdict of guilty; and in either case, the court may thereupon dismiss the information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted. The probationer shall be informed of this right in his probation papers': PROVIDED, That in any subsequent prosetion, for any other offense, such prior conviction may be pleaded and proved, and shall have the same effect as if probation had not been granted, or the information or indictment dismissed.

10.40.175 Substitution for plea of guilty. At any time before judgment, the court may permit the plea of guilty to be withdrawn, and other plea or pleas substituted.

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IN THE

SUPREME COURT DAVIS, CLERK

OF THE
UNITED STATES

October Term, 1967

No. 16

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Respondent.

No. 22

WILLIAM EARL WALKLING,

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WASHINGTON STATE BOARD OF PRISON TERMS AND PAROLES,

Respondent.

RESPONDENTS' BRIEF

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STATE PRINTING PLANT, OLYMPIA, WASH.

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WASHINGTON STATE BOARD OF PRISON TERMS AND PAROLES,

Respondent.

RESPONDENTS' BRIEF

The courts of the State of Washington, like all state jurisdictions and the United States Courts, have statutory authority granted by their respective legislatures and the Congress, concerning the procedures relating to the granting and revocation of probation to persons convicted of crimes.

Judgments of the Supreme Court of the State of Washington denying writs of habeas corpus under the Probation Act of the State of Washington (RCW 9.95.200-9.95.240) are presented for review by this court upon writs of certiorari previously granted.

STATEMENT OF CASES MEMPA v. RHAY, No. 16

The petitioner, Jerry Douglas Mempa, (hereinafter sometimes referred to as Mempa) had been involved in a number of serious crimes and offenses. prior to his becoming seventeen years of age. When he was thirteen years old, Mempa was before the Juvenile Court for Spokane County on the charge of having committed a Burglary. He was detained in the Juvenile Detention Home in Spokane for one week, and then released on a probationary status. At fourteen years of age, he again appeared before the Juvenile Court on charges of Burglary and Malicious Vandalism and found by the court to be a delinquent child and committed to a state juvenile correctional institution at the Greenhill School at Chehalis, Washington. Mempa remained at that institution for approximately eight months when he was released to his parents. Within sixty days of his release, Mempa was found in possession of a device to start the motor of an automobile without a key, commonly known as a "hot wire." This resulted in his placement in a juvenile detention home from which he attempted to

^{&#}x27;The text of the statutes are set forth in full in Appendix A.

break out along with several of the other children detained there. As a result, Mempa was again committed to the state correctional institution for juveniles at the Greenhill School in Chehalis, Washington. On March 24, 1958, Mempa was returned to the juvenile court of Spokane County from the Greenhill School as a result of his participation in a riot at that institution. He was returned as an "incorrigible" under the then existing statutory authority for the return of incorrigibles to the committing court. Thereafter, a petition was filed alleging Mempa to be a "psychopathic delinquent", and he was sent to the Eastern State Hospital at Medical Lake, Washington, near Spokane, for observation and diagnosis as to whether or not he was a "psychopathic delinquent" as defined by law. He was, thereafter, transferred to the Western State Hospital and the physicians of that institution were of the opinion that he was a "psychopathic delinquent" and he was returned to Spokane County. He was, thereafter, again sent to the Eastern State Hospital for observation and it was the opinion of that institution that Mempa was not a psychopathic delinquent. The court then dismissed the petition and Mempa was returned to his parents, M.R. 10-11. During the proceedings on the petition, alleging Mempa as being a "psychopathic delinquent", he was represented by Mr. Paul Cooney, his court-appointed attorney. (M.R. 14, 32)

The first ten years of his life, Mempa was raised

Wherever appearing in this brief, the designation M.R. refers to the transcript of record in Mempa v. Rhay.

and grew up with his grandparents. Thereafter, he resided with his mother and his stepfather in Spokane. Apparently, Mempa was permitted to drop out of school prior to the completion of the eighth grade of his education. (M.R. 11)

On April 28, 1959, at approximately 7:00 p.m., Mempa was taken into custody and placed in the Juvenile Detention Home in the City of Spokane on the basis of the charge of which he was thereafter convicted, and, as a result, he is now confined by the respondent. On the following day, as his probation officer was carrying on a conversation with him, and, at the same time, returning him to his place of detention within the home, the petitioner broke away from the probation officer and escaped from the Juvenile Detention Home. On May 1, 1959, without notice or hearing, the Juvenile Department of the Superior Court for Spokane County made its order remanding the case of the petitioner to the prosecuting authorities of Spokane County for appropriate proceedings under the provisions of the Criminal Code of the State of Washington. In the company of

Mempa petitioned the Supreme Court of the State of Washington for a writ of habeas corpus contending that he had been denied due process when the juvenile court declined to exercise juvenile authority without notice or conducting a hearing. The Supreme Court of Washington in Cause No. 39048 agreed and ordered the matter referred to the juvenile court of the superior court for Spokane County for the purpose of conducting a hearing on the subject of the appropriateness of the declination of juvenile authority and to provide Mempa with the requirements of due process in such cases as set forth in Dillenburg v. Maxwell, 68 W.D. 2d 481, 413 P.2d 940 as modified on rehearing 70 W.D. 2d 325 (January 19, 1967). A hearing was held in the Superior Court for Spokane County and a finding was made that the declination of juvenile authority was appropriate when made and recommitting Mempa to the custody of the respondent.

his stepfather, the petitioner turned himself into the sheriff's office on May 18, 1959. (M.R. 13)

By information filed by the Prosecuting Attorney for Spokane County on May 26, 1959, Mempa was charged with having committed the crime of Taking a Motor Vehicle Without The Permission of The Owner contrary to the provisions of RCW 9.54.020. (M.R. 8)

Shortly following the filing of the Information the court appointed counsel, Mr. Willard Roe, to give aid and assistance to Mempa in his defense. (M.R. 9, 13)

The petitioner, in the company of his attorney, came before the Superior Court for Spokane County for arraignment on June 17, 1959. (M.R. 9) At that time, the petitioner entered a plea of "Guilty", to the crime of Taking A Motor Vehicle Without The Permission of The Owner as charged in the Information. (M.R. 10) Following the plea, the Prosecuting Attorney recited to the court, some of the prior experience of Mempa with the law and the details of the crime of which he then stood convicted. (M.R. 10 -13) Then Mr. Willard Roe, the petitioner's court-appointed attorney made a plea to the court to grant the petitioner probation. Following some colloquy between the court and the petitioner, the court pronounced sentence which it suspended on the condition that the petitioner serve thirty days in the county jail. (M.R. 18) The court, in pronouncing sentence, stated: (M.R. 18)

"The Court: Very well. It is the further judgment of the Court that you be confined in the institution for a maximum periord of ten years. Now, I am going to suspend every bit of that except thirty days. I want you to serve thirty days actually on this. I want to point out to you now that when you are released, you are going to be under observation not only of the juvenile officers, but of the state parole officers. Those men know their business. They are kindly disposed. They will be there for the purpose of seeing that you don't get back here again. Take advantage of this, or you are going to be back here. You are absolutely on your own now. Mr. Roe can't help you, and no one else can help you, and if you steal a car, you are going to Monroe and you are going to stay there. I would think that you would realize that this is a real opportunity, and that you would behave your-* " (M.R. 18, 19) self from now on.

The petitioner was then granted probation for a period of two years under the supervision of the State Board of Prison Terms and Paroles. (M.R. 20)

Approximately sixty days following the granting of probation to Mempa, he became involved in a Burglary on the evening of September 15, 1959 of

The Supreme Court of the State of Washington in Mempa v. Rhay, 68 Wn.2d 882, 883, 416 P.2d 104, 105, indicates that the imposition of sentence was deferred in Mempa's case, which we are of the belief was an incorrect assumption and that the trial court actually pronounced sentence but suspended its execution upon the observance of certain conditions. Although the difference between a deferred and suspended sentence is as stated in Korematsu v. United States, 379 U.S. 432 "one of trifling degree".

Mark's Auto Sales in the City of Spokane from which he and his companion removed a television set, radio, and three rifles. The Prosecuting Attorney for Spokane County then filed his motion for an order revoking probation with an affidavit attached setting forth the violation of the conditions of probation, and the matter was brought on for hearing before the court on October 23, 1959. (M.R. 24, 25)

At the time of the hearing in the Superior Court for Spokane County, on the motion for the revocation of probation, the petitioner was not represented by counsel, nor was he advised of a right to the appointment of counsel to give aid and assistance to him if he were without funds to employ his own counsel, nor did Mempa request the appointment of counsel, or to be afforded the services of the attorneys who had previously been appointed by the court to represent him.

During the course of the hearing on the revocation of the petitioner's probation, a portion of the affidavit setting forth the details of the petitioner's participation in the burglary of Mark's Auto Sales was read to him and he was then asked whether or not it was true and he responded in the affirmative. (M.R. 25) At the conclusion of the hearing, the court signed the order revoking the petitioner's probation and imposed a sentence of not more than ten years confinement which had previously been pronounced but the execution stayed. (M.R. 26)

Late in the year 1965, the petitioner, Jerry Mempa, made application to the Supreme Court of the State of Washington for a writ of habeas corpus, (M.R. 1-3) to which the Attorney General, on behalf of the respondent, filed his return and answer. (M.R. 5-7). Following the submission of briefs by the parties, the matter was noted for hearing before the court and formal presentation of the matter was made by the Attorney General and the Supreme Court of Washington rendered its opinion on June 23, 1966. (M.R. 40-59) Certiorari was granted by this court on February 13, 1967. (M.R. 62)

WALKLING vs. WASHINGTON STATE BOARD OF PRISON TERMS AND PAROLES No. 225

The petitioner, William Earl Walkling (hereinafter sometimes referred to as Walkling) was accused of having committed the crime of Burglary In the Second Degree in an Information filed in the Superior Court of the State of Washington for Thurston County on October 11, 1962. (W.R. 11)

An arraignment proceeding was conducted in the petitioner's case in the Superior Court of the State of Washington for Thurston County on October 29, 1962. The petitioner was present in court at

Since the granting of certiorari in this case and on May 17, 1967, the petitioner was granted parole by the Washington State Board of Prison Terms and Paroles and released from the custody of the former respondent, B. J. Rhay, Superintendent of the Washington State Penitentiary. The petitioner is presently being supervised on parole and resides with his mother, Mrs. Phoebe Walkling, Rt. 1, Box 475, Centralia, Washington. The petitioner has made a motion for the change of respondents to reflect the parole of the petitioner and both the counsel for the respondent and the petitioner have entered into a stipulation that the change in the caption of the case may be effectuated to appropriately indicate the custody of the petitioner.

Wherever appearing in this brief, the designation W.R. refers to the transcript of record in Walkling v. Washington State Board of Prison Terms and Paroles No. 22.

that time and was accompanied and represented by his attorney, W. N. Beal. After the court having advised the petitioner concerning his rights, he was asked what his plea was to the crime of Burglary In The Second Degree as charged in the Information, and the petitioner entered his plea of "Guilty". Following the petitioner's plea of Guilty, the attorney for Walkling, Mr. W. N. Beal, presented arguments to the court that the sentencing of the petitioner should be deferred and that he be granted probation. The court granted the request of counsel for Walkling and imposition of sentence was deferred for a period of three years from October 29, 1962, and the petitioner, Walkling, was granted probation on condition that he maintain "general good behavior", "make monthly reports to the Board of Prison Terms and Paroles" and, "abide by their rules and regulations." Also, as a condition of the deferral of sentence, Walkling, was required to serve ninety days in the Thurston County Jail with credit for time previously served, and, in addition, to pay his proportionate share of restitution and the costs of prosecution. (W.R. 13 and 14)

A bench warrant was ordered to be issued by the Superior Court for Thurston County for the arrest of Walkling on May 21, 1963, on the grounds that he had allegedly violated the terms of his probation by his failure to make his reports to his probation officer as required, and, that he had absconded from the jurisdiction of the State of Washington. Walkling's whereabouts were not known until Feb-

ruary 24, 1964 when he was arrested by the Sheriff of Lewis County Washington, and, an Information was filed in that county by the Prosecuting Attorney charging Walkling with having committed fourteen (14) counts of Forgery In The First Degree and fourteen (14) counts of Grand Larceny. The petitioner was transferred from the Lewis County Jail to the Thurston County Jail on April 16, 1964 on the basis of the bench warrant previously issued by the court. The petitioner was brought before the Superior Court of the State of Washington for Thurston County on May 12, 1964 for hearing on the petition of the Prosecuting Attorney for an Order Revoking the Order Deferring Sentence and granting the petitioner probation. At that time the petitioner requested that the matter be continued for the purpose of enabling him to secure the services of an attorney to assist him in the matter. The court granted Walkling's request and the hearing was continued to May 18, 1964 at 9:00 o'clock a.m. On May 18, 1964, the matter was again called for hearing at the prescribed time and the petitioner was present in court without counsel, but petitioner advised the court that Smith Troy, an Olympia Attorney was supposed to be present and represent him. The matter was then held in abevance until 9:15 a.m. and it was again called and the defendant appeared without counsel and the court proceeded with the hearing. The petitioner's probation officer, one Clare Murray, gave testimony before the court concerning Walkling's violation of the terms of his probation. At the conclusion of the

hearing, the court being satisfied that the petitioner's probation should be revoked, entered its order revoking its deferral of the sentence and imposed sentence upon the petitioner's conviction on his plea of Guilty of the crime of Burglary In The Second Degree, sentencing the petitioner to a maximum term of imprisonment of not more than fifteen (15) years, such judgment and sentence being entered on May 18, 1964. (W.R. 6-9, 15-18)

A record was not made of what transpired at the hearing on the Prosecuting Attorney's petition for the revocation of Walkling's probation, and the Judge who presided at that hearing, the Honorable Raymond W. Clifford, is now deceased. However, the affidavit of the Deputy Prosecuting Attorney who presented the matter to the court, clearly indicates that Judge Clifford, as a matter of custom and practice, did not advise defendants appearing before the Court upon motions to revoke probation of a right to the assistance of counsel to be paid for at public expense. (W.R. 17, 18)

The petitioner made application, through counsel for the American Civil Liberties, Union, to the Supreme Court of the State of Washington, for a writ of habeas corpus contending:

"Petitioner's constitutional rights were violated at the hearing in the following manner. Petitioner was denied his right to the assistance of counsel in a hearing which resulted in his being imprisoned. At no time did he waive the assistance of counsel. On the contrary, he specifi-

cally requested such assistance on several occasions. A defendant charged with such activities as will result in a revocation of probation and impostion of a prison sentence is entitled to have the court appeint counsel to protect the petitioner's rights and the failure to do so, denies him due process of law in violation of the Washington State Constitution and the United States Constitution." (W.R. 1 - 2)

The matter came on before the Supreme Court of the State of Washington for hearing on October 7, 1966 at which time Walkling was represented by his present attorney, Mr. Evan L. Schwab, and the respondent was represented by Stephen C. Way, Assistant Attorney General. The court stated the issue in its order, thusly:

"1. Whether or not the petitioner's constitutional rights were violated upon the grounds that the superior court of the State of Washington, in and for the County of Thurston in Cause No. C-2941, prior to the hearing on the motion to revoke the petitioner's probation and impose sentence upon his conviction of the crime of Burglary In The Second Degree, did not advise him of the right to be provided with an attorney to give aid and assistance to the petitioner to be provided for at public expense." (W.R. 19)

The court concluded that the petitioner's application for a writ of habeas corpus should be denied assigning its reasons as follows:

"1. The application of William Earl Walkling for a writ of habeas corpus is controlled by this court's recent decision in *Mempa v. Rhay*, 68

W.D. 2d 871 and his constitutional rights were not violated on the grounds alleged for the reasons assigned in the decision by this court in Mempa v. Rhay, supra." (W.R. 19 - 20)

The petitioner's application to this court for a writ of certiorari was granted on February 13, 1967. (W.R. 21)

ISSUES PRESENTED

Counsel for the petitioners, in their brief to this court, phrase the issues as follows:

"(1) Does the Fourteenth Amendment confer a right to counsel during a state court probation revocation proceeding?

(2) Does the Fourteenth Amendment confer a right to counsel at the sentencing and judgment stage of a state court criminal proceeding?

(3) If such a right to counsel exists, and in the absence of waiver, must counsel be appointed for a defendant unable to employ counsel?"

ARGUMENT OF COUNSEL FOR THE RESPONDENTS

I

RIGHT TO COUNSEL AT PROBATION REVOCATION HEARINGS

A. SIXTH AMENDMENT CONSIDERATIONS

SUMMARY OF ARGUMENT

The probation revocation hearings held in the petitioners' cases were not "eximinal prosecutions" and they were not "accused" persons within the meaning of the Sixth Amendment to the Constitution as made applicable to the states through the Fourteenth Amendment to the Constitution of the United States.

The suspension of sentence and granting probation in criminal cases, is authorized by statute in all states and in federal jurisdictions. There was a time when it was disputed as to whether or not the state and federal courts possessed the power, either inherently or arising from the common law, to suspend sentence. This issue was probably set to rest by the decision of this court in Ex parte United States, 242 U.S. 27, concluding that the federal judiciary was without authority to suspend sentence "upon considerations extraneous to the legality of the conviction" without legislative authority. This court, in Ex parte United States, supra, stated in part as follows:

^{&#}x27;18 USC 3651 et. seq.

"Indisputably under our constitutional system the right to try offenses against the criminal laws and upon conviction to impose the punishment provided by law is judicial, and it is equally to be conceded that in exerting the powers vested in them on such subject, courts inherently possess ample right to exercise reasonable, that is, judicial, discretion to enable them to wisely exert their authority. But these concessions afford no ground for the contention as to power here made, since it must rest upon the propostion that the power to enforce begets inherently a discretion to permanently refuse to do so. And the effect of the propostion urged upon the distribution of powers made by the Constitution will become apparent when it is observed that indisputable also is it that the authority to define and fix the punishment for crime is legislative and includes the right in advance to bring within judicial discretion, for the purpose of executing the statute, elements of consideration which would be otherwise beyond the scope of judicial authority, and that the right to relieve from the punishment, fixed by law and ascertained according to the methods by it provided, belong to the executive department

In 1925 the Congress of the United States enacted legislation authorizing "the courts of the United States" to suspend sentences and to grant, modify and revoke probation. The Act was first construed in *United States v. Murray*, 275 U.S. 347.

The probation statutes in the states provide for a variety of different procedures. Some of the states

expressly authorize the revocation of probation without conducting a hearing and, in some instances, without prior notice. Several of the state's statutes do not indicate whether a hearing on the revocation of probation is required or not. Others imply that a hearing should be held before the probation is revoked. Many of the statutes which require that hearings be held before probation may be revoked qualify this by indicating that the hearing may be summary or informal in character.

In Burns v. United States, 287 U.S. 216 (1932) and Escoe v. Zerbst, 295 U.S. 490 (1935), this court set forth the principles and philosophies underlying the Federal Probation Act, which decisions, without doubt, have formed the basis for many of the decisions in the Circuit Courts of the federal judiciary and in the state courts construing the legal rights, remedies and procedures under the respective probation Acts.

In Burns v. United States, supra, the petitioner had been convicted of three counts of an Indictment and sentenced to terms of imprisonment on each count, the execution of the imprisonment on the last count having been suspended and he was granted probation. During the service of the sentence on the first count, Burns was brought before the district court by its order for the purpose of investigating a report that he had violated the terms of his probation. The district court found that Burns had

^{*}Law and Practice in Probation and Parole Revocation Hearings; 55 Criminal Law, Criminology and Police Science, 1775.

violated the terms of his probation and the probation was revoked. The court of appeals affirmed and the Supreme Court of the United States granted certiorari.

Mr. Chief Justice Hughes, in his opinion for the court, stated in part, as follows:

Probation is thus conferred as a privilege and cannot be demanded as a right. It is a matter of favor, not of contract. There is no requirement that it must be granted on a specified showing. The defendant stands convicted; he faces punishment and cannot insist on terms or strike a bargain. To accomplish the purpose of the statute, an exceptional degree of flexibility in administration is essential. It is necessary to individualize each case, to give that careful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion. The provisions of the Act are adapted to this end. It authorizes courts of original jurisdiction, 'when satisfied that the ends of justice and the best interests of the public, as well as the defendant, will be subserved, 'to suspend the imposition of execution of sentence' and 'to place the defendant upon probation for such period upon such terms and conditions as they may deem best.'

"There is no suggestion in the statute that the scope of the discretion conferred for the purpose of making the grant is narrowed in providing for its modification or revocation. The authority for the latter purpose immediately follows that given for the former, and, is in turn, equally broad. 'The court may revoke or modify any condition of probation, or may change the period of probation.' There are no limiting requirements as to the formulation of charges, notice of charges, or manner of hearing or determination. No criteria for modification or revocation are suggested which are in addition to, or different from, those which pertain to the original grant. The question in both cases is whether the court is satisfied that its action 'will subserve the ends of justice and the best interests of both the public and the defendant. The only limitation, and this applies to both the grant and any modification of it, is that the total period of probation shall not ex-* * " (Emphasis ours.) ceed five years

"The duty placed upon the probation efficer to furnish each probationer under his supervision 'a written statement of the conditions of probation' and to 'instruct him regarding the same' cannot be deemed to restrict the courts' discretion in modifying the terms of probation or in revoking it. The evident purpose is to give appropriate admonition to the probationer not to change his position from the possession of a privilege to the enjoyment of a right. He is still a person convicted of an offense, and the suspension of his sentence remains within the controls of the court " " (Emphasis ours)

"The question, then, in the case of the revocation of probation, is not one of formal procedure either with respect to notice or specification of charges or a trial upon charges. The question is simply whether there has been an abuse of discretion, and is to be determined in accordance with familiar principles governing the exercise of judicial discretion." (Emphasis ours)

Burns had complained to the court regarding the summary nature of the hearing on the revocation of the probation. The court stated on this latter point:

"The hearing was summary but it cannot be said that it was improper or inadequate, in view of the nature of the proceeding and of the particular point upon which the court rested its decision. The court revoked the probation upon defendant's admissions of his dereliction and it does not appear that there was abuse of discretion."

In Escoe v. Zerbst, supra, the petitioner was convicted of a crime upon his plea of Guilty to the Indictment and was sentenced to a term of imprisonment of four and one-half years. Sentence was suspended and he was granted probation for five years on certain conditions. Upon the report of the probation officer, Escoe's probation was revoked without a hearing and he was arrested and forthwith transported to the penitentiary. Escoe filed a petition for habeas corpus in the district court contending that his constitutional rights had been violated when he was not afforded a hearing on the revocation of his probation. The district court dismissed the petition for the writ which was affirmed on appeal. This court granted certiorari and, in the opinion for the court written by Mr. Justice Cardoza, the

following statements of philosophy relating to federal probation are set forth:

"Under the statute as amended as well as in its original form, the probationer 'shall forthwith be taken before the court'. This mandate was disobeyed. The probationer, instead of being brought before the court which had imposed the sentence, was taken to a prison beyond the territorial limits of that court and kept there in confinement without the opportunity for hearing. For this denial of a legal privilege the commitment may not stand.

"In thus holding, we do not accept the petitioner's contention that the privilege has a basis in the Constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose. Burns v. United States, 287 U.S. 216, 77 L.Ed. 266, 53 S.Ct. 154 * * (Emphasis ours)

"The privilege is no less real because its source is in the statute rather than in the Fifth Amendment. " Clearly, the end and aim of an appearance before the court must be to enable an accused probationer to explain away the accusation. The charge against him may have been inspired by rumor or mistake, or even downright malice. He shall have a chance to say his say before the word of his pursuers is received to his undoing. This does not mean that he may insist upon a trial in any strict formal sense. Burns v. United States, supra. It does mean that there shall be an in-

quiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper.

* * * " (Emphasis ours)

Against this backdrop of the philosophy and rationale on the subject of probation, its grant and revocation and the application of constitutional principles pronounced in Burns v. United States, and Escoe vs. Zerbst, supra, a plethora of case law has developed in the state courts, and the circuit courts of the federal judiciary, concluding that not only the constitutional right to counsel, but other familiar principles of constitutional law are inapplicable to hearings on the revocation of probation, and the imposition of sentence.

In Shum v. Fogliani, — Nev. —, 413 P.2d 495 (1966) the appellant petitioned for a writ of habeas corpus on the grounds that he was not represented by counsel when brought before the court on proceeding to revoke his probation. He was indigent at all times. The writ was denied and he took an appeal to the Supreme Court of Nevada which ruled that a court need not appoint counsel for an indigent on a proceeding to revoke probation.

The court, in the course of its opinion, stated in part as follows:

"Here, of course, the constitutionality of the underlying conviction is not questioned. The petitioner's guilt of the underlying crime was constitutionally established. On a proceeding to revoke probation, the court is not concerned with the probationer's guilt or innocence of the underlying crime. Rather, its sole concern is whether the privilege of probation should be revoked because of the failure to meet the conditions imposed. And, if revocation is ordered, the sentence he is required to serve is punishment for the underlying crime rather than for his failure to comply with the terms of probation. Brown v. Warden, U. S. Penitentiary, 351 F.2d 564 (7th Cir. 1965). For these reasons, decisions regarding the federal constitutional right to counsel at various stages of a criminal prosecution are not controlling. Cf. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Hamilton v. State of Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961); White v. State of Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963); Escobedo v. State of Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964); Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). In the cases just cited, the denial of counsel was deemed to have destroyed the validity of the conviction. That consideration is not present on a proceeding to revoke probation.

In the federal law, probation is a privilege granted by Congress. The source of the probationer's privilege is to be found in the Federal Probation Act. One convicted of crime is not given a right to probation by the federal Constitution. Burns v. United States, 287 U.S. 216, 53 S.Ct. 154, 77 L.Ed. 266 (1932); Escoe v. Zerbst, 295 U.S. 490, 55 S.Ct. 818, 79 L.Ed.

1566 (1935); Brown v. Warden U. S. Penitentiary, supra; Welch v. United States, 348 F.2d 885 (6th Cir. 1965); United States v. Huggins, 184 F.2d 866 (7th Cir. 1950); Gillespie v. Hunter, 159 F.2d 410 (10th Cir. 1947); Bennett v. United States, 158 F.2d 412 (8th Cir. 1946). Accordingly, the rights of an offender in a proceeding to revoke his conditional liberty under probation or parole are not coextensive with the federal Constitutional rights of one accused in a criminal prosecution. Hyser v. Reed, 115 U.S. App. D. C. 254, 318 F.2d 225 (1963); Richardson v. Markley, 339 F.2d 967 (7th Cir. 1965); Brown v. Warden, U. S. Penitentiary, supra."

Another case finding that the right to counsel does not apply in probation revocation hearings is Brown v. Warden, United States Penitentiary, 351 F.2d 564 (CCA 7, 1965), Cert. den. 382 U.S. 1028 in which the court stated in the course of its opinion, in part, as follows:

"An offender's rights under the Federal Probation Act have been construed in Burns v. United States, 287 U.S. 216, 53 S.Ct. 154, 77 L.Ed. 266 (1932) and in Escoe v. Zerbst, 295 U.S. 490, 55 S.Ct. 818, 79 L.Ed. 1566 (1935). The act is intended to provide a period of grace in order to aid the rehabilitation of a penitent offender. Probation is conferred as a privilege and cannot be demanded as a matter of right. The offender stands convicted and faces punishment. The source of his rights under the Federal Probation Act lies in the

legislative mandate, not in the Constitution of the United States.

"Congress has declared that a probationer accused of violating his probation 'shall be taken before the court for the district having jurisdiction over him.' Section 3653, Title 18 U.S.C.A. Although no trial in any strict or formal sense is required, the legislative directive that the accused probationer shall be taken before a court means that—

fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper.'

Escoe v. Zerbst, 295 U.S. at 493, 55 S.Ct. at 820.

"The inquiry of the court at such hearing is not directed to the probationer's guilt or innocence in the underlying criminal prosecution, but to the truth of the accusation of a violation of probation. Has the probationer abused the privilege of the period of grace extended to him to aid him in rehabilitation?

"Liberty on probation is conditioned on the observance of certain conduct. A breach of the required conduct—not necessarily the commission of a crime—constitutes a violation and serves to terminate the privilege of conditional liberty. Although revocation results in the deprivation of the probationers' liberty, the sentence he may be required to serve is the punishment for the crime of which he had previously been found guilty

"Thus, it appears that under the Federal Probation Act as construed by the Supreme Court, the source and nature of the offender's rights and the issue before the court on hearing of revocation of probation differ from those on imposition of sentence in a criminal prosecution. It follows that an offender who has already been adjudged guilty and sentenced is not entitled to counsel as a matter of right under the Sixth Amendment of the Constitution of the United States or under Rule 44 of the Federal Rules of Criminal Procedure in the hearing on revocation wherein it is determined whether or not he has forfeited the privilege of conditional liberty. Welsh v. United States, 348 F.2d 885 (6th Cir. 1965); United States v. Huggins, 184 F.2d 866, 868 (7th Cir. 1950); Gillespie v. Hunter, 159 F.2d 410 (10th Cir. 1947); Behnett v. United States, 158 F.2d 412 (8th Cir. 1946). Decisions concerned with the constitutional right to counsel of an accused at various stages of criminal prosecutions are not controlling. Cf. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); United States v. Tribote, 296 F.2d 598 (2d Cir. 1961)."

In Kennedy v. Maxwell (1964), 176 Ohio St. 215, 198 N.E. 2d 658, 659, 660, the court there stated in part on the right to counsel in probation revocation hearings:

tence was void because he did not have counsel appointed to represent him at the hearing on the revocation of his probation. The right to

appointment of counsel relates only to the actual trial of the accused. Once one is convicted and placed on probation, his trial is terminated, and one does not have the right to have counsel appointed to represent him on a subsequent hearing for the revocation of his probation. Thomas v. Maxwell, Warden, 175 Ohio St. 233, 193 N.E. 2d 150."

And in United States v. Huggins, (7th CCA 1950) 184 F.2d 866, 868 the court stated in part:

"Whether the ends of justice will best be met by a revocation of probation is a matter of discretion with the trial court, and a probationer when brought before the court for such determination without being furnished counsel, has not been deprived of his constitutional right. Gillespie v. Hunter, 159 F.2d 410."

In People v. Wood, 2 Mich. App. 342, 139 N.E.2d 895, 897 (1966) the court stated in part:

"In response to the question as to whether a defendant has a right to counsel at a hearing on probation revocation, we believe that under present interpretation of appellate courts, the answer is that there is no guarantee of right to counsel at such hearing."

In Welsh v. United States, (CCA 6, 1965) 348 F.2d 885, 887, that court, in commenting on the constitutional right to the assistance of counsel in probation revocation matters in federal courts, stated in the course of its opinion in part as follows:

"Petitioner also contends that he was deprived of his constitutional right to assistance of counsel at the hearing when probation was

revoked. In addition to the fact that petitioner made no request for counsel at that hearing, the constitutional right to the assistance of counsel in the defense of a criminal prosecution, given by the Sixth Amendment, does not apply to a hearing on a motion to revoke probation. Bennett v. United States, 158 F.2d 412, 415, C.A. 8th, cert. denied 331 U.S. 822, 67 S.Ct. 1302, 91 L.Ed. 1838; Gillespie v. Hunter, 159 F.2d 410, 411 C.A. 10th; United States v. Huggins, 184 F.2d 866, 868, C.A. 7th; Crowe v. United States, 175 F.2d 799, 801, C.A. 4th, Cert. denied 338 U.S. 950, 70 S.Ct. 478, 94 L.Ed. 586, rehearing denied 339 U.S. 916, 70 S.Ct. 559, 94 L.Ed. 1341; Richardson v. United States, 199 F.2d 33, 35, C.A. 10th; Cupp v. Byington, 179 F. Supp. 669, 670, S.D. Ind. See: Gilpin v. United States, 265 F.2d 203, and cases cited at page 204, C.A. 6th; Barker v. State of Ohio. 330 F.2d 594, and cases cited, C.A. 6th."

Other cases which have arrived at substantially the same conclusion are Franklin v. State, 87 Idaho 2991, 392 P.2d 552 (1964); State v. Edelblute, — Idaho —, 424 P.2d 739 (1967); Ex parte Levi, 39 Calif., 2d 41, 244 P.2d 403; Johnson v. Tinsley, 234 F. Supp. 866, (D.C. Colo., 1964), affirmed 337 F.2d 856.

Although, these cases are concerned only with the right to counsel at a hearing on the revocation of probation, the conclusion is inescapable that the decision will also bear upon the rights of parolees at hearings relative to the revocation of parole or conditional pardon and perhaps, it would even bear upon the rights of prisoners at disciplinary hearings within correctional institutions resulting in a change of custody or deprivation of privileges. In Hyser v. Reed, 318 F.2d 225, (D.C. Cir.), cert. den, 375 U.S. 957 (1963) an excellent discussion is found on the rights of federal parolees before the United States Board of Parole. The court discusses and denies to the parolee the right to court-appointed counsel, the right to confrontation and cross-examination of witnesses and right to compulsory process to obtain witnesses.

A case which is also noteworthy is Roberts v. United States, 320 U.S. 264. In that case the issue was whether or not the district court, under the federal probation act was authorized to set aside, following the revocation of probation, a sentence previously imposed and to impose a new sentence with a harsher penalty. The authority of the district court was challenged by the petitioner on two grounds; (1), that the interpretation of the Probation Act did not contain the authority to increase the penalty once imposed; and (2), if the probation act is construed to grant the district courts that authority, the increased sentence violated the double jeopardy clause of the Fifth Amendment.

It was decided by the court that the Probation Act did not confer upon the courts the power to increase a sentence previously imposed following the revocation of probation. The court, through Mr. Justice Black, stated in part, as follows:

"To construe the Probation Act as not permitting the increase of a definite term of imprisonment fixed by prior valid sentence gives full meaning and effect to both the first and second sections of the Act. In no way does it impair the Act's usefulness as an instrument to accomplish the basic purpose of probation, namely to provide an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official and under the continuing power of the court to impose institutional punishment for his original offense in the event that he abused this opportunity. To accomplish this basic purpose Congress vested wide discretion in the courts. See Burns v. United States, 287 U.S. 216, 77 L.Ed. 266, 53 S.Ct. 154. (Emphasis ours)

In the dissent of the late Mr. Justice Frankfurter, concurred in by the Chief Justice and Mr. Justice Reed, the following observation was made:

"It would be strange if the Constitution stood in the way of a system so designed for the humane treatment of offenders. To vest in courts the power to adjust the consequences of criminal conduct to the character and capacity of an offender, as revealed by a testing period of probation, of course does not offend the safeguard of the Fifth Amendment.

But to set a man at large after conviction on condition of his good behavior and on default of such condition, to incarcerate him, is neither to try him twice nor to punish him twice. If Congress sees fit, as it has seen fit, to employ such a system of criminal justice there is nothing in the Constitution to hinder." (Emphasis ours)

Although not directly in point on its facts, some of the thoughts expressed in the case of Williams v. New York, 337 U.S. 241 (1949) are pertinent to the considerations before the court in the cases at bar. Williams was convicted of the crime of MURDER IN THE FIRST DEGREE in a New York Court by a verdict of a jury, which recommended life imprisonment, but the judge, pursuant to the authority of a New York Statute, imposed the death sentence. A hearing was held before the trial judge at the time of the imposition of sentence, and the petitioner was represented by three attorneys who gave arguments concerning the death penalty and requesting the court to follow the recommendation of the jury and impose a sentence of life imprisonment. The trial judge, under the New York sentencing statute, has the discretion to consider information about the convicted person's life, health, habits, conduct, mental and moral propensities obtained through outside sources which a defendant is not permitted to confront or cross examine. The petitioner appealed to the New York Court of Appeals, contending that the statutory procedure for the imposition of sentence as applied in New York, was in violation of the due process clause of the Fourteenth Amendment, on the

basis that it was imposed upon information supplied by witnesses whom the accused had not been confronted with, and to whom he had no opportunity of cross examination or rebuttal. The same challenge was made before the Supreme Court of the United States, and, in the opinion of the court by Mr. Justice Black, the following statements are found:

"Appellant urges that the New York statutory policy is in irreconcilable conflict with the underlying philosophy of a second procedural policy grounded in the due process of the law clause of the Fourteenth Amendment. That policy, as stated in In re Oliver, 333 U.S. 257, 273, 92 L.Ed. 682, 694, 68 S. Ct. 499, is in part that no person shall be tried and convicted of an offense unless he is given reasonable notice of the charges against him and is afforded an opportunity to examine adverse witnesses. That the due process clause does provide these salutary and time-tested protections where the question for consideration is the guilt of a defendant seems entirely clear from the genesis and historical evolution of the clause. Chamber v. Florida, 309 U.S. 227, 236, 237, 84 L.Ed. 716, 721, 722, 60 S.Ct. 472, and authorities cited in Note 10r (Emphasis ours)

"Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and

types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law. A recent manifestation of the historical latitude allowed sentencing judges appears in Rule 32 of the Federal Rules of Criminal Procedure. That rule provides for consideration by federal judges of reports made by probation officers containing information about a convicted defendant, including such information 'as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant.' * The practice of probation which relies heavily on non-judicial implementation has been accepted as a wise policy. Execution of the United States parole system rests on the discretion of an administrative parole board. (citing the statutory authority) Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.

"Modern changes in the treatment of offenders make it more necessary now than a century ago for observance of the distinctions in the evidential procedure in the trial and sentencing processes. For indeterminate sentences in probation have resulted in an increase in the discretionary powers exercised in fixing punishment. * * *

"The considerations we have set out admonish us against treating the due process clause as a uniform command that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to

guide their judgment toward a more enlightened and just sentence. * * The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due process clause would hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice. Escoe v. Zerbst, 295 U.S. 490, 79 L.Ed. 1566 (1935)." (Emphasis supplied)

If the right to counsel exists, for the aid of convicted persons at probation revocation hearings, it would seem clear that such right is not derived through the Sixth Amendment to the Constitution of the United States as made applicable to the states by its incorporation into the Fourteenth Amendment to the Constitution of the United States.

The Sixth Amendment to the Constitution of the United States provides in part:

"In all, criminal prosecutions, the accused shall enjoy the right * * to have the assistance of counsel for his defence".

It is undisputed that the petitioners, Mempa and Walkling, were convicted upon their pleas of "Guilty" of the crimes respectively of Taking a Motor Vehicle Without the Permission of the Owner and Burglary in the Second Degree, and during all of the proceedings leading to their convictions, they were accorded all of their constitutional rights, including representation by counsel. Manifestly, it must follow that upon conviction of the

crimes of which they were charged, the petitioners ceased to be "accused" persons, and, as well, at that point, the "criminal prosecutions" terminated, insofar as those terms are employed in the Sixth Amendment to the Constitution of the United States.

A probation revocation hearing has, for its basic purpose, the determination of the question of whether the probationer has breached the trust vested in him, by the court at the time of the grant of probation and its conditions violated. The hearing on revocation of probation does not partake of the formalities of procedure that are customarily applied in criminal prosecutions. Escoe v. Zerbst, supra; Burns v. United States, supra. If the court finds during the probation revocation hearing, that the probationer has been derelict in his observance of the conditions of his probation, the judgment and sentence may thereafter be imposed, which comes as a result of the conviction of the underlying crime and not the breach of the conditions of probation. The judgment of conviction and the resulting sentence of imprisonment have at all times been known or outstanding.

As this court stated in *United States v. Zucher*, 161 U.S. 475, the "Sixth Amendment" relates to a prosecution of an accused person which is technically criminal in nature. Also see *Hannah v. Lorche*, 36 U.S. 420, 440 (Note 16).

As well, it was held in Levine v. United States, 362 U.S. 610 that the Sixth Amendment was not applicable to criminal contempt proceedings even

though conviction could result in imprisonment. Also, to the same effect, U. S. v. Barnett, 376 U.S. 681.

The probation revocation hearings held in the cases of *Mempa* and *Walkling* before the courts of the State of Washington were not "criminal prosecutions", and they, as convicted persons, did not assume the role of "accused" persons within the meaning of those terms as found in the Sixth Amendment to the Constitution of the United States.

Accordingly, we respectfully submit that the petitioners here did not have a constitutional right to the assistance of counsel in their respective probation revocation hearings under the authority of the Sixth Amendment to the Constitution of the United States as made applicable to the states by its incorporation into the Fourteenth Amendment to the Constitution of the United States.

RIGHT TO COUNSEL AT PROBATION REVOCATION HEARINGS

B. DUE PROCESS

SUMMARY OF ARGUMENT

The right of the petitioner to not be deprived of their liberty without due process of law was decided at the time of their convictions of having committed their respective crimes against society. The grant and revocation of probation did not have the effect of reviving or otherwise transforming this right so as to enable them to insist upon these rights anew.

The fact that these petitioners are convicted persons and the criminal prosecutions which lead to the convictions of the crimes of which they have been charged, are not drawn in issue before this court, is the distinguishing factor between these cases and this court's decisions concerning the right to counsel in Gideon v. Wainwright, 372 U.S. 335 (1963); Escobedo v. Illinois, 378 U.S. 478; Miranda v. Arizona, 384 U.S. 436 (1966); Powell v. Alabama, 287 U.S. 45 (1932); White v. Maryland, 373 U.S. 59 (1963) and In re Gault, 387 U.S. — 18 L.Ed.2d 527, 87 S.Ct. 1428 (May 15, 1967).

At the time the petitioners were before the courts of the State of Washington and the courts granted the petitioners the privilege of probation, and at all times thereafter, the petitioners were convicted persons, and no question remained of their

guilt or innocence. Their release to conditional liberty on probation is a privilege granted under the statute, which may be exercised at the discretion of the trial court and probation once granted, does not thereafter become transformed to a right.

Speaking to this point in Burns v. United States, 287 U.S. 216 (1932) the court stated:

"There is no suggestion in the statute that the scope of the discretion conferred for the purpose of making the grant is narrowed in providing for its modification or revocation. The authority for the latter purpose immediately follows that given from the former, and is, in turn, equally broad. The court may revoke or modify any condition of probation, or may change the period of probation. There are no limiting requirements as to formulation of charges, notice of charges, or manner of hearing or determination. No criteria for modification or revocation are suggested which are, in addition to, or different from those which pertain to the original grant. The question in both cases is whether the court is satisfied that its action will subserve the ends of justice to the best interest of both the public and the defendant.

At the time of the petitioners' convictions of the crimes of which they had been charged, they, thereafter, became liable to serve a term of imprisonment and their Fourteenth Amendment right not to have the state "deprive any person of * * * liberty * * without due process of law" had been fulfilled.

In Gideon v. Wainwright, supra, and the other cases cited in the first paragraph of this section of the brief, the court has decided that in those cases where a person who has either been accused of committing a crime, or of juvenile delinquency, or under certain circumstances, when in custody in respect to either, he is entitled to have the aid and assistance of a lawyer for the protection of his interests, then and at the time of his trial, if, in the case of juvenile delinquency, it may result in a period of confinement.

The petitioners here are not accused persons, in the sense of Gideon v. Wainwright, and the other cases cited above, their guilt of the crimes charged has been established. Further, the petitioners were not subjected to the formalities and complexities of a formal trial, when brought before the court for a hearing relative to the revocation of their probations. The intricacies of an Information or Indictment are not a part of a probation revocation matter, the hearing is not before a jury and is customarily informal, the quantum of proof of a breach of the conditions of probation, is not proof beyond a reasonable doubt, but merely sufficient to satisfy the court that the probationer has violated the terms of his probation. The only requirement in a probation revocation hearing is that the exercise of judicial discretion by the court in such matters be fair and not arbitrary or capricious, and in keeping with that measure of "fundamental fairness" that due process of law requires.

There has been no showing by the petitioners here of fundamental unfairness in the probation revocation hearings held in the petitioners' cases.

We respectfully submit that the "due process of law" clause of the Fourteenth Amendment to the Constitution of the United States did not confer upon these petitioners a right to court-appointed counsel to be paid for at public expense in their respective probation revocation hearings.

I

RIGHT TO COUNSEL AT PROBATION REVOCATION HEARINGS

C. EQUAL PROTECTION OF THE LAWS

SUMMARY OF ARGUMENT

A probation revocation hearing is not a criminal prosecution; there is no question of guilt or innocence, nor is the probationer discriminated against by the lack of counsel, he has his hearing, which is uncomplicated by formalities and the intricacies of pleading and briefs. Unlike Douglas v. California, 372 U.S. 353 lack of counsel does not frustrate his opportunity to be heard. An invidious discrimination is absent here.

It is claimed by petitioner that the procedures in the State of Washington, in not providing for court-appointed counsel and the advice of that right in probation revocation hearings, has denied them "equal protection of the laws" within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Admittedly, RCW 9.95.220 (a) requires that a probationer who is charged with a violation of the conditions of probation must be "brought before the court" and hearings are held in court relative to the alleged violations and retained counsel do appear in these proceedings. However, the Probation Act, (RCW 9.95.200 - 240, Appendix A) makes no mention whatsoever of counsel for probationers at probation revocation hearings, either counsel appointed by the court, or counsel retained by probationers.

The principles which the equal protection of the laws clause of the Fourteenth Amendment evokes, as set forth in Griffin v. Illinois, 351 U.S. 12 have previously been applied to the appellate procedures involving indigent defendants in the courts of the State of Washington. Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U.S. 214; Draper v. Washington, 372 U.S. 487 and Woods v. Rhay, 357 U.S. 575.

In Griffin v. Illinois, supra, Eskridge v. Washington, supra, and Woods v. Rhay, supra, the court was concerned with the constitutional right of indigent defendants to free transcripts on appeal.

In Draper v. Washington, et al., 372 U.S. 487 the court, in an opinion by Mr. Justice Goldberg, discussed the conclusions of Griffin and Eskridge to be as follows:

" * * The principle of Griffin is that '(d)estitute defendants must be afforded as adequate appellate review as defendants who

have money enough to buy transcripts,' 351 U.S., at 19, a holding restated in Eskridge to be 'that a state denies a constitutional right guaranteed by the Fourteenth Amendment if it allows all convicted defendants to have appellate review except those who cannot afford to pay for the records of their trials,' 357 U.S., at 216. In Eskridge the question was the validity of Washington's long-standing procedure whereby an indigent defendant would receive a stenographic transcript at public expense only if in the opinion of the trial judge, 'justice will thereby be promoted.' Id. 357 U.S. at 215. This Court held per curiam that; given Washington's guarantee of the right to appeal to the accused in all criminal prosecutions, Wash. Const. Art. I.§ 22 and Amend 10. '(t) he conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right to full appellate review available to all defendants in Washington who can afford the expense of a transcript,' Id. 357 U.S. at 216. and remanded the cause for further proceedings not inconsistent with the opinion."

In Douglas v. California, 372 U.S. 353, in an opinion for the court, delivered by Mr. Justice Douglas, the court struck down a California procedure which denied the indigent petitioner's request for counsel on appeal from their criminal prosecution in which the California Court of Appeals had "gone through" the record and determined that "no good whatever could be served by appointment of counsel." The court concluded in part:

"* * Where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." (Emphasis ours)

All of the cases cited and quoted from above, are concerned with the "criminal prosecution" and the constitutional right to "the one and only appeal" an indigent defendant has from the determination of guilt of the criminal offense. Obviously, the cases at bar, present questions of a substantially different character, quality and magnitude from the Griffin case and the cases following and adopting the Griffin rationale. As we have taken some pains to point out earlier in this brief, a probation revocation hearing is a proceeding entirely separate and apart from the underlying criminal conviction and prosecution. The right to such a hearing is not derived from the constitution, but from the legislative authority contained in the Probation Act. RCW 9.95.220, (App. A) Burns v. United States, supra, Escoe v. Zerbst, supra. Furthermore, in contrast to an appeal from a criminal conviction as was involved in the Griffin case and its successors adopting this rationale, a probation revocation hearing is a simple uncomplicated process. The intricacies of an Information or Indictment are not involved; the formalities of trial and procedure are not present; the hearing customarily being informal, the strict rules of evidence are not applied. Of course, the preparation of an appeal and the presentation both in writing and orally to

an appellate court presents complications and requires a measure of expertise that a layman ordinarily does not possess. Such technical problems are not present in a probation revocation hearing. Unlike the failure to have a transcript of a record on appeal or to have counsel to give aid and assistance in the preparation of the written and oral presentation to the appellate court as were involved in Griffin, will likely completely prevent the defendant from enjoying his constitutional right to appellate review. This result would not follow where a probationer did not have counsel at a probation revocation hearing. He would have his hearing and likely would do as well, if not better, even though not represented by counsel.

The Probation Act of the State of Washington (App. A) makes no mention whatsoever in its provisions concerning representation by counsel, either retained by the probationer or appointed by the court to be paid for at public expense. We submit that there is not present in the Washington Law an "invidious discrimination". Williamson v. Lee Optical of Oklahoma, Inc., 348, U.S. 483. The equal protection clause does not demand that the statutes and laws of the several states require that there be absolute equality between the rich and poor in the formulation and application of the laws of their respective states. Nor, does it prevent the state "from adopting a law of general applicability that may affect the poor more harshly than it does the rich, or, on the other hand,

from making some effort to redress economic imbalances while not eliminating them entirely." Douglas v. California, 372 U.S. at 361.

We feel that the rationale and philosophy expressed in Griffin v. Illinois, supra, and Douglas v. California, supra, should not be applied here, for the denial of the right to court-appointed counsel does not arise by force of the language of the Washington Probation Act, but, by custom and practice and where the hearing is a statutory right, not having its basis in the Constitution, and as well, the right to hearing is not totally frustrated in the absence of court-appointed counsel. Accordingly, we respectfully submit that the petitioners, Mempa and Walkling were not denied their constitutional right to "equal protection of the laws" within the meaning of the Fourteenth Amendment to the Constitution of the United States when the courts of the State of Washington did not provide them with counsel to be paid for at public expense at their probation revocation hearings or to advise them of their rights in this respect.

II

RIGHT TO COUNSEL AT TIME OF THE IMPOSITION OF SENTENCE FOLLOWING THE REVOCATION OF PROBATION.

A. Due Process Considerations.

SUMMARY OF ARGUMENT

The imposition or execution of sentence and commitment to prison following the revocation of probation is required by statute. The sentence of the court is fixed by statute, there can be no mitigation of such sentence. In the absence of a showing by petitioners of substantial prejudice or fundamental unfairness at the time of the imposition of sentence without counsel or advice of that right, there has been no denial of due process.

After the court revokes probation the statutes of Washington (RCW 9.95.220, set forth in full in App. A) require the court to take the following steps:

been pronounced by the court and the execution thereof suspended, the court may revoke such suspension, whereupon the judgment, shall be in full force and effect, and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory as the case may be. If the judgment has not been pronounced the court shall pronounce judgment after such revocation of probation and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory, in accordance with the sentence imposed."

The statute (quoted in part above) makes it plain, that if the court revokes probation, the defendant must then be sentenced and committed to the state penitentiary or state reformatory. No discretion in this respect is vested in the trial court and the sentence is fixed by statute—the court fixes the maximum sentence only (RCW 9.95.010) and the Board of Prison Terms and Paroles fixes the minimum duration of confinement. (RCW 9.95.040) The imposition of sentence or the execution of a sentence previously pronounced as prescribed in the Probation Act occurs at the probation revocation hearing and is as much a part of that hearing as the proceedings concerning the violation of the conditions of probation and, therefore, is not a part of the criminal prosecution.

In the absence of a showing of fundamental unfairness in the probation revocation hearings followed by the imposition of sentence in these cases, we submit that the petitioners have not suffered a deprivation of their right to "due process of law."

In Townsend v. Burke, 334 U.S. 736 relied on by the petitioners, was a case in which this court decided that the petitioner there, being uncounseled at the time of sentencing was, under the circumstances, denied that measure of "fundamental fairness" required by the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Townsend had been convicted in the State of Pennsylvania of two charges of ROBBERY and two charges of Burglary. At all times he was unrepresented by counsel and was not advised of a right to counsel nor offered the assignment of counsel at public expense. He petitioned the Supreme Court of Pennsylvania for writ of habeas corpus which was denied and certiorari was granted by the Supreme Court of the United States.

Following the petitioner's plea of Guilty to eertain of the charges made against him, the following action took place in the trial court:

"By the Court (addressing Townsend):

"Q. Townsend, how old are you?

"A. 29.

"Q. You have been here before, haven't vou?

"A. Yes sir.

"Q. 1933, larceny of automobile. 1934, larceny of produce. 1930, larceny of bicycle. 1931, entering to steal and larceny. 1938, entering to steal and larceny in Doylestown. Were you tried up there? No. no, Arrested in Doylestown. That was up on Germantown Avenue, wasn't it? You robbed a paint store.

"A. No. That was my brother.

"Q. You were tried for it, weren't you?

A. Yes, but I was not guilty.

"Q. And 1945, this. 1936, entering to steal and larceny, 1350-Ridge Avenue. Is that your brother too?

"A. No.

"Q. 1937, receiving stolen goods, a saxophone. What did you want with a saxophone?

Didn't hope to play in the prison band then, did you?

"THE COURT: Ten to twenty in the Peni-

tentiary."

"The trial court's facetiousness casts a somewhat somber reflection on the fairness of the proceeding when we learn from the record that actually the charge of receiving the stolen saxophone had been dismissed and the prisoner discharged by the magistrate. But it savors of foul play or of carelessness when we find from the record that, on two others of the charges which the court recited against the defendant, he had also been found not guilty. Both the 1933 charge of larceny of an automobile, and the 1938 charge of entry to steal and larceny, resulted in his discharge after he was adjudged not guilty. We are not at liberty to assume that items given such emphasis by the sentencing court, did not influence the sentence which the prisoner is now serving.

"We believe that on the record before us, it is evident that this uncounseled defendant was either overreached by the prosecution's submission of misinformation to the court or was prejudiced by the court's own misreading of the record. Counsel, had any been present, would have been under a duty to prevent the court from proceeding on such false assumptions and perhaps under a duty to seek remedy elsewhere if they persisted. Consequently, on this record we conclude that, while disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue.

Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand.

"We would make clear that we are not reaching this result because of petitioner's allegation that his sentence was unduly severe. The sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction, much less on review of the state court's denial of habeas corpus. It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process.

"Nor do we mean that mere error in resolving a question of fact on a plea of guilty by an uncounseled defendant in a non-capital case would necessarily indicate a want of due process of law. Fair prosecutors and conscientious judges sometimes are misinformed or draw inferences from conflicting evidence with which we would not agree. But even an erroneous judgment, based on a scrupulous and diligent search for truth, may be due process of law.

"In this case, counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair

play which absence of counsel withheld from this prisoner."

We respectfully submit that the records in these cases most certainly do not show any foul play or overreaching upon any of the matters relating to the petitioners in these cases and no allegations in that direction are made by the petitioners, and we submit that on that basis, the petitioners' right to "due process of law" has not been violated.

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RIGHT, TO COUNSEL AT TIME OF THE SENTENCING FOLLOWING THE REVO-CATION OF PROBATION

B. Equal Protection of the Laws SUMMARY OF ARGUMENT

Uncounseled convicted persons, including petitioners, who have had their probations revoked and judgment and sentence imposed upon a plea of guilty, cannot be said to have suffered an invidious discrimination constituting a denial of equal protection of the laws when all things occurring and subject to remedial action would have happened during the period when they were represented and advised by lawyers. The only exception would be in regard to the probation revocation hearing which is subject to very narrow review on appeal.

We submit that the "equal protection of the laws" clause does not impose on the State of Washington an "affirmative duty to lift the handicaps flowing from differences in economic circumstances". Although the "state may have a moral obligation to eliminate the evils of poverty, but it is not required by the equal protection clause to give to some, what others can't afford." Douglas v. California, 372 U.S. 353, 362.

Whether or not there has been a denial of "equal protection of the laws", is in our belief, dependent upon the circumstances, and if such circumstances amount to a discrimination inimical to that measure of fair play that our system of American Jurisprudence requires.

What then can counsel do for a defendant at sentencing following revocation of probation under the law of the State of Washington?

As we have earlier observed, there can be no mitigation of sentence, and sentence must be mandatorily imposed or executed on revocation of probation. The term of the sentence is fixed by law, there can be little chance for the entry of an erroneous sentence.

Motions may be made at this time, regardless of whether sentence has been entered or not, for change of plea from "guilty" to "not guilty." RCW 10.40-.175, State v. McLaughlin, 59 Wn.2d 865, 371 P.2d 55. Such motions are addressed to the sound discretion of the trial court. State v. Taft, 49 Wn.2d 98, 297 P.2d 1116. Denial of motions for change of plea constitute an abuse of judicial discretion, only where a substantial right of the defendant has been in-

vaded or his constitutional rights have been violated. State v. Rose, 42 Wn.2d 509, 256 P.2d 493.

Respecting the possibilities of motions for changes of pleas in the petitioners' cases, it must be remembered, that they were represented by counsel at the time of the entry of their pleas of "guilty." And, it must be necessarily and, in fairness to all attorneys, be presumed that they perform their duties to criminal defendants in keeping with the canons of legal ethics and their oath on becoming members of the bar. If then, these counseled petitioners, at the time of plea, had suffered a violation of their rights, constitutional or otherwise, it would have been known to counsel and appropriate remedial action taken.

Admittedly, in Washington, the right to appeal arises at the time of the entry of judgment and sentence when the imposition of sentence has been deferred, State v. Farmer, 39 Wn.2d 675, 237 P.2d 734, but, if sentence has been pronounced but the execution of the sentence suspended (as may be the situation in Mempa,) then the time within which to exercise the right of appeal commences at the time of the pronouncement of sentence. State v. Lilliopoulous, 165 Wash. 197, 5 P.2d, 319.

An appeal from a judgment and sentence entered upon a plea of Guilty is exceedingly limited in its scope, and only those matters which amount to an invasion of a substantial right, or a denial of a constitutional right are reviewable on appeal. State

v. Rose, supra. Again, any appealable errors would have been known to counsel who represented the petitioners at the time of their arraignment and plea and appropriate action taken by such attorneys.

We submit the motion to change plea and to appeal from a judgment and sentence on a plea of guilty, which were available to these petitioners, (with the possible exception of Mempa) are possibilities in their cases, which are empty of substance, and, if they were real possibilities, they were known when represented by counsel.

The only area which an attorney might be able to exercise judgment upon, relative to an appeal, is in regard to whether the court has abused its discretion in revoking probation. But, even here, the limitations on review are such that few appellants can hope for success. In State ex rel. Woodhouse v. Dore, 69 W.D.2d 64, 416 P.2d 670, the court stated on this point as follows:

"Once the fact of guilt has been established in accordance with due process of law, as it was here by a plea of guilty competently made, all further proceedings of a judicial nature, except where prescribed by statute, fall within the court's broad discretionary powers. Although the defendant may be heard on such matters as the granting, denial or revocation of probation, the hearing need not meet the standards of due process prescribed for the trial of criminal cases. It is sufficient if the defendant is apprised of the reasons for and facts upon which the contemplated revocation depends and is

given fair opportunity to be heard in defense, refutation, or explanation of them. But the right to be heard does not include a correlative right to a formal trial.

"If the record discloses sufficient facts warranting a judicial officer to reasonably conclude that the probation has been a failure or in the words of the statute (RCW 9.95.220) that the probationer is 'violating the terms of his probation, or engaging in criminal practices, or is abandoned to improper associates, or living a vicious life,' then the courts of review are not to substitute their discretion in the premises for that of the sentencing judge.

Furthermore, there is no showing here that the lack of counsel by either petitioner resulted by reason of his economic situation and preventing him from retaining counsel of his own choosing. In fact, in Walkling, the petitioner advised the court that he desired to retain counsel and was given a continuance for that purpose, but his counsel, Smith Troy, did not appear at the time the matter was called for hearing. (W.R. 8)

Accordingly, we respectfully submit that the record does not show, in either of these cases, that the petitioners were discriminated against upon the basis of their financial inability to procure the services of counsel to give aid and assistance to them at the time of the probation revocation hearing followed by the imposition of sentence contrary to the "equal protection of the laws" clause of the Fourteenth Amendment to the Constitution of the United States.

III ·

WAIVER OF RIGHT TO COUNSEL

SUMMARY OF ARGUMENT

Waiver is not relied upon by Respondents as a defense in these cases.

The Supreme Court of the State of Washington in Mempa v. Rhay, 68 Wn.2d 882, 891, 416 P.2d 104. (M.R. 48) stated in connection with the principle of waiver, as follows:

"A criminal defendant adequately represented by counsel, who, with counsel at his side, upon the entry of a plea of Guilty or in the trial culminating in conviction accepts probation status, does so on the basis of the existing stat-These clearly authorize termination of probation and imposition of sentence without notice and without reference to allegations of denial of constitutional rights, admittedly pertaining to more orthodox criminal proceedings in the trial courts of this state. In such a context it may even be said that there has been a waiver of any right to claim denial of criminal due process procedure in a proceeding involving termination of probation status and the imposition of sentence. * " (Emphasis ours)

Although the point made by the Supreme Court in its opinion is most certainly worthy of consideration, it is not relied on by respondents in the defense of this matter. We readily recognize that the rule on waiver as pronounced by this court in Johnson v. Zerbst, 304 U.S. 458 and Carnley v. Cochran, 369

U.S. 506, requires that there must be knowledge of the rights or relinquishment of rights competently and intelligently made which must appear of record. If the records in these cases indicated that the courts had advised the petitioners of a right to counsel to be paid for at public expense which had been dedined by the petitioners, or, if, at the time of the' granting of probation by the respective courts, the petitioners had been advised that if they accepted probation, they would not be afforded the opportunity to have counsel at a probation revocation hearing to be paid for at public expense and then accepted probation, then the doctrine of waiver might be appropriate. However, these elements are absent from these cases and, therefore, the respondents do not rely on the doctrine of waiver in these cases consistent with the law pronounced in the above cited cases.

IV

JUDGMENT OF THE COURT

If this court should be of the opinion that the decisions of the Supreme Court of the State of Washington in these cases should be reversed and remanded, there are factors relating to the relief to be afforded in each of these cases which should be given consideration.

The petitioners have raised no constitutional issues relative to the constitutional validity of the conviction of the crime of TAKING A MOTOR VEHICLE

WITHOUT THE PERMISSION OF THE OWNER in the case of Mempa, or, the conviction in the Walkling case of the crime of Burglary in the Second Degree. The only constitutional challenge made by petitioners relates to the constitutional propriety of conducting their respective probation revocation hearings followed by the imposition of sentence without being afforded the opportunity to have courtappointed counsel to be paid for at public expense.

In the case of Walkling, No. 22, it should perhaps be noted, that his custodial status under the supervision of the respondent, THE WASHINGTON STATE BOARD OF PRISON TERMS AND PAROLES, is substantially the same as prevailed prior to the revocation of his probation. Walkling is, of course, now on parole and he is being supervised by the same agency, the respondent, THE WASHINGTON STATE BOARD OF PRISON TERMS AND PAROLES, that supervised him while he was on probation. The only difference between his custodial status when on probation, and now, while on parole, is that the question of his continued liberty is to be determined by the Board of Prison Terms and Paroles rather than the Superior Court of the State of Washington for Thurston County which was the situation while on probation. These factual circumstances in Walkling No. 22 may be suggestive of mootness.

However, if the court should take the position that the Supreme Court of the State of Washington has committed error of constitutional preportions on the grounds alleged by the petitioners, we respectfully submit that the State of Washington should have the opportunity of either restoring the petitioners to the probation status which they were in prior to their challenged probation revocation hearings or, to conduct a new probation revocation hearing in these cases on the same grounds as were previously asserted for revocation of probation, affording them the right to counsel at public expense at such new hearing, and at the time of sentence, if that be the result of the revocation hearing.

CONCLUSION

WHEREFORE, the respondents conclude for the reasons appearing above, that the decision of the Supreme Court of the State of Washington in these cases should be affirmed.

Respectfully submitted,

JOHN J. O'CONNELL,

Attorney General . of the State of Washington

STEPHEN C. WAY,

Assistant Attorney General of the State of Washington

Counsel for Respondents.

APPENDIX A

RCW 9.95.200—Probation by court—Board to investigate.

After conviction by plea or verdict of guilty of any crime, the court upon application or its own motion, may summarily grant or deny probation, or at a subsequent time fixed may hear and determine, in the presence of the defendant, the matter of probation of the defendant, and the conditions of. such probation, if granted. The court may, in its discretion prior to the hearing on the granting of probation refer the matter to the board of prison terms and paroles or such officers as the board may designate for investigation and report to the court at a specified time, upon the circumstances surrounding the crime and concerning the defendant, his proper record, and his family surroundings and environment. In case there are no regularly employed parole officers working under the supervision of the board of prison terms and paroles in the county or counties wherein the defendant is convicted by plea or verdict of guilty, the court may, in its discretion, refer the matter to the prosecuting attorney or sheriff of the county for investigation and report.

RCW 9.95.210—Conditions may be imposed on probation.

The court in granting probation, may suspend the imposing or the execution of the sentence and may direct that such suspension may continue for such period of time, not exceeding the maximum term of sentence, except as hereinafter set forth and upon such terms and conditions as it shall determine.

The court in the order granting probation and as a condition thereof, may in its discretion imprison the defendant in the county jail for a period not exceeding one year or may fine defendant any sum not exceeding one thousand dollars plus the costs of the action, and may in connection with such probation impose both imprisonment in the county jail and fine and court costs. The court may also require the defendant to make such monetary payments, on such terms as it deems appropriate under the circumstances, as are necessary '(1) to comply with any order of the court for the payment of family support, (2) to make restitution to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question, and (3) to pay such fine as may be imposed and court costs, including reimbursement of the state for costs of extradition if return to this state by extradition was required, and may require bonds for the faithful observance of any and all conditions imposed in the probation. The court shall order the probationer to report to the board of prison terms and paroles or such officer as the board may designate and as a condition of said probation to follow implicitly the instructions of the board of prison terms and paroles. The board of prison terms and paroles will promulgate rules and regulations for the

conduct of such person during the term of his probation.

RCW 9.95.220—Violation of probation—Rearrest—Imprisonment.

Whenever the state parole officer or other officer under whose supervision the probationer has been placed shall have reason to believe such probationer is violating the terms of his probation, or engaging in criminal practices, or is abandoned to improper associates or living a vicious life, he shall cause the probationer to be brought before the court wherein the probation was granted. For this purpose any peace officer or state parole officer may rearrest any such person without warrant or other process. The court may thereupon in its discretion without notice revoke and terminate such probation. In the event the judgment has been pronounced by the court and the execution thereof suspended, the court may revoke such suspension, whereupon the judgment shall be in full force and effect, and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory as the case may be. If the judgment has not been pronounced, the court shall pronounce judgment after such revocation of probation and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory, in accordance with the sentence imposed. RCW 9.95.230—Court revocation or termination of pro-

bation.

The court shall have authority at any time during the course of probation to (1) revoke, modify,

or change its order of suspension of imposition or execution of sentence; (2) it may at any time, when the ends of justice will be subserved thereby, and when the reformation of the probationer shall warrant it, terminate the period of probation, and discharge the person so held.

RCW 9.95.240—Dismissal of information or indictment after probation completed.

Every defendant who has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, may at any time prior to the expiration of the maximum period of punishment for the offense for which he has been convicted be permitted in the discretion of the court to withdraw his plea of guilty and enter a plea of not guilty, or if he has been convicted after a plea of not guilty, the court may in its discretion set aside the verdict of guilty; and in either case, the . court may thereupon dismiss the information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted. The probationer shall be informed of this right in his probation papers: Provided, That in any subsequent prosecution, for any other offense, such prior conviction may be pleaded and proved, and shall have the same effect as if probation had not been granted, or the information or indictment dismissed.

APPENDIX B

CERTIFICATION OF STATES JOINING RESPONDENTS AS AMICI CURIAE

I certify in accordance with Rule 42 that the Attorneys General named below have authorized in writing that their names and titles be appended to this brief on behalf of the states which they represent, and, as joining amici curiae the Honorable JOHN J. O'CONNELL, ATTORNEY GENERAL of the STATE OF WASHINGTON and STEPHEN C. WAY, ASSISTANT ATTORNEY GENERAL as Counsel for respondents, in support of the position taken in the foregoing brief on the issues presented.

STEPHEN C. WAY
Assistant Attorney General.

Honorable MacDONALD GALLION ATTORNEY GENERAL

STATE OF ALABAMA

Honorable ARTHUR K. BOLTON ATTORNEY GENERAL

STATE OF GEORGIA

Honorable ALLAN G. SHEPARD ATTORNEY GENERAL

STATE OF IDAHO

Honorable JAMES S. ERWIN ATTORNEY GENERAL

STATE OF MAINE

Honorable HELGI JOHANNESON ATTORNEY GENERAL STATE OF NORTH DAKOTA

Honorable ROBERT Y. BUTTON
ATTORNEY GENERAL
Honorable RENO S. HARP, III
ASSISTANT ATTORNEY GENERAL
STATE OF VIRGINIA



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> STATES IN THE SUPREME COURT OF THE UNITED

JERRY, DOUGLAS MEMPA,

Petitioner,

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State the Washington B. J. RHAY, as Superintendent of the Was penitentiary at Walla Walla, Washington,

Respondent.

Term 1967 91. No.

WILLIAM EARL WALKLING,

VS.

Petitioner,

WASHINGTON STATE BOARD OF PRISON TERMS AND PAROLES,

Respondent.

Term 1967 22 NO. 2 SUPPLEMENTAL AUTHORITIES

JUSTICE AND ASSOCIATE THE UNITED STATES. THE HONORABLE EARL WARREN, CHIEF JUSTICES OF THE SUPREME COURT, OF TO:

the General of Washington OF JOHN J. O'CONNELL Attorney State of

STEPHEN C. WAY Assistant Attorney General Counsel for Respondents.

and Post Office Address: Office

98501 Olympia, Washington Code 206 753 5430 Justice Telephone Temple of

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STATES THE UNITED OF COURT IN THE SUPREME

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JERRY DOUGLAS MEMPA,

VS.

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Petitioner,

State of the Washington Washington, s Superintendent at Walla Walla, B. J. RHAY, Penitentiary RHAY,

Respondent.

NO. 16 Oct. Term 1967

WILLIAM EARL WALKLING,

VS.

Petitioner

STATE BOARD OF PRISON TERMS AND PAROLES WASHINGTON

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966 ·

No. 424
JERRY DOUGLAS MEMPA,

Petitioner.

B. J. RHAY, SUPERINTENDENT
WASHINGTON STATE PENITENTIARY,
Respondent.

No. 734
WILLIAM EARL WALKLING,

Petitioner,

B. J. RHAY, SUPERINTENDENT
WASHINGTON STATE PENITENTIARY,
Respondent.

BRIEF OF THE STATE OF FLORIDA, AS AMICUS CURIAE, JOINED AND SUPPORTED BY THE STATE OF IDAHO

INTEREST OF THE AMICI

The petitioners for certiorari in the above cases raised the question of whether a probationer is entitled to have counsel appointed in his behalf at a revocation of probation hearing.

The interest of the Attorney General of the State of Florida in this question is substantial. As chief legal officer of the State of Florida, the Attorney General is concerned with maintaining a fair balance between effective law enforcement to protect society against crime and the observance of procedural due process in the administration of criminal justice. As counsel to the officers of this state, the Attorney General is concerned with the seriously disruptive effects upon the administration of the probation system which would inevitably flow from equating the revocation hearing with a criminal prosecution and extending to it the same procedural safeguards.

Mindful of the precedence that these cases may establish with regard to probation hearings, the State of Idaho joins the State of Florida in presenting their position in this brief amici curiae filed with the court pursuant to Rule 42.

QUESTION PRESENTED

Since this brief is not filed in support of either affirmance or reversal of any of the cases to which it relates, the question is stated in general terms, rather than in the factual framework of any of the cases:

Whether due process of law demands that counsel be appointed indigent probationers in state revocation of probation hearings.

SUMMARY OF ARGUMENT

I

We oppose the extension of new constitutional restrictions to revocation of probation hearings. Neither the literal text nor

the originally intended meaning of the "assistance of counsel" clause of the Sixth Amendment comprehend the same procedural safeguards in post trial disposition of criminals as those of the trial itself. In the few decisions on the subject, this court, the majority of the lower federal courts, as well as the several state courts, have held that the procedure to be employed in revocation of probation hearings is derived specifically from statutes which authorize them and not from any provisions of the state or federal constitutions. There are varied differences in the state court decisions explained by the differences found in the various statutes. The majority, however, follow the language used by this court in cases decided under the federal probation statute. Since probationers have been adjudged guilty of committing certain acts against society and afforded all the safeguards during their particular trials, their subsequent disposition within the community, rather than prison confinement, represents a privilege bestowed upon them by the court.

Such disposition represents a widely recognized practice in rehabilitating unhardened offenders and making them useful members of society. The nature of probation revocation hearings is not such as to require an indigent probationer to fend for himself. The probationer is simply given an opportunity to explain away the accusation that he has broken a condition of his probation. For this purpose most of the jurisdictions, federal and state, afford the probationer an appearance before the court which granted him probation.

Procedural development in this area should take into account the underlying purposes of the probation system and the wide discretion given the courts and probation officials in the effective administration of the system. State courts and administrative agencies are currently and closely concerned with the problems connected with the probation system and recognize that effective rehabilitation of convicted offenders includes an application of fair standards not inconsistent with the overall purposes of the system.

ARGUMENT

Failure to appoint counsel for indigent probationers at revocation hearings does not violate due process of law.

Prior to passage of the federal Probation Act in 1925 (43 Stat. 1259), the federal district courts had no power at all to suspend sentences and release convicts on probation. Ex Parte United States, 242 U.S. 27 (1916). This situation was remedied by Congress when it passed the Probation Act. Affronti v. United States, 350 U.S. 79 (1955). Accordingly, cases decided by this court under the federal act have indicated that probationers derive their rights from the act itself rather than the constitution. Roberts v. United States, 320 U.S. 264 (1943); Escoe v. Zerbst, 295 U.S. 490 (1935); Burns v. United States, 287 U.S. 216 (1932). The Escoe case, supra, established that under the federal statute a probationer was entitled to an appearance before the court as a prerequisite to commitment for probation violation. The court went further to say that:

"In thus holding we do not accept the petitioner's contention that the privilege has a basis in the constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose." Escoe v. Zerbst, supra, at 492, 493.

Both federal and state court decisions have employed reasoning similar to that used in *Escoe v. Zerbst*, supra. The rationale of the courts has been that probationers are convicted criminals. They have been granted probation as a matter of grace and after trials wherein they were afforded all the safeguards due them through the Fourteenth Amendment to the United States Constitution.

A. ELEMENTS OF THE CONSTITUTIONAL ISSUE

The extent to which provisions of the Bill of Rights are incorporated in and made applicable to the states by the Fourteenth Amendment remains a matter of dispute within the court.² In our approach to the issues of these cases we assume, arguendo, that in constitutional terms the right to counsel is the same under the Sixth and Fourteenth Amendments.

In a number of recent cases, this court has extended the right to counsel to areas heretofore not recognized as falling within the due process clause of the Fourteenth Amendment. The right to have counsel appointed for indigent felony defendants at the time of trial was settled by Gideon v. Wainwright, 372

^a See the concurring opinion of Mr. Justice Harlan in Ker v. California, 374 U.S. 23, 44, 45 (1963), and his dissenting opinion in Griswald v. Connecticut, 381 U.S. 479, 500 (1965)

¹ See e.g., Brown v. Warden, 351 F. 2d 564 (7 Cir. 1965), cert. denied, 382 U.S. 1028 (1966); Welsh v. United States, 348 F. 2d 885 (6 Cir. 1965); Jones v. Rivers, 338 F. 2d 862 (4 Cir. 1964); Thomas v. United States, 327 F. 2d 795 (10 Cir. 1964), cert. denied, 377 U.S. 1000 (1964); Hyser v. Reed, 318 F. 2d 225 (D.C. Cir. 1963); Yates v. United States, 308 F. 2d 737 (10 Cir. 1962); United States v. Lane, 284 F. 2d 935 (9 Cir. 1960); United States v. Kenton, 262 F. Supp. 205 (D. Conn. 1967); State v. Johnson, 403 P. 2d 938 (Ariz. App. 1965); Gehl v. People, 423 P. 2d 332 (Colo. 1967); Franklin v. State, 392 P. 2d 552 (Idaho 1964); People v. Wood, 139 N.W. 2d 895 (Mich. App. 1966); Harris v. Langlois, 202 A. 2d 288 (R.L. 1964)

It must be stressed that revocation of probation hearings are not the same type of proceedings dealt with in Gideon, Miranda, and Re Gault, all supra. These cases concerned defendants who were charged with violating the law; where the machinery of state government was primarily concerned in the apprehension and disposition of law violators. The basis of these decisions seems to be that the right to counsel is essential to a fair trial before an impartial tribunal in which every defendant stands equal before the law. Probationers at revocation hearings are not being tried, however. They have already been tried and found guilty of violating the law. Since a revocation of probation hearing is a post-trial proceeding, its inquiry is simply directed toward determining whether or not the probationer has violated the conditions of the probation. Brown v. Warden, supra, Note 1. Thus, our concern should be: Whether the procedures employed in revocation of probation hearings are so unfair that probationers are deprived of due process of law.

B. HISTORICAL FACTORS AND ESTABLISHED PRACTICE

The probation system as treatment for convicted offenders has been described as America's distinctive contribution to progressive penology. Newman, Sourcebook on Probation, Parole, and Pardons, 68-69 (1958). The system had its beginning around 1841 in Massachusetts, but it wasn't until 1878 that probation was first regulated by statute and 1956 that systems

existed in all the states. Dressler, Practice and Theory of Probation and Parole, 18-21 (1959). The federal system got its start in 1925 (43 Stat. 1259).

The procedures used in revoking probation vary according to the jurisdictions. This variance has come about since the statutes in the area of revocation hearings do not elaborate on the scope of the hearings but deal instead with the broader question of whether or not hearings are required (see Appendix A, infra). As a result, the revoking authority has assumed the responsibility of determining what the statutes have demanded. Louis B. Sharp, Chief, Probation Division, Administrative Office of the United States Courts, has outlined hearings and procedures used in the federal courts:

"... the probation officer ordinarily testifies at the hearing and a written report is submitted to the court. The report is not shown to the probationer. Witnesses against the probationer usually do not appear in court, even if the facts are disputed. If witnesses are produced by the probation authorities, the probationer may not cross-examine them as of right, but 'may with permission of the court.' He may not present evidence or witnesses 'as a general rule.' Retained counsel is not permitted at the hearing. Counsel will not be assigned. Notice of charges is 'generally' given 'at the time of arrest' and 'prior to the hearing.' Sklar, Law and Practice in Probation and Parole Revocation Hearings, 55 Jour. of Crim. Law, Criminology, and Police Science, 175, 192 (1964). (Hereinafter cited Sklar.)

More than half the state statutes expressly provide for a revocation hearing or employ language from which a hearing can be inferred. Others expressly provide that the hearing may be "summary" or "informal." (Appendix A, infra.) The

probation officer can usually arrest the probationer when there is reasonable belief that he has violated the conditions of probation. The defendant is usually given notice of the alleged violations and then brought before the court to give his side of the story. The probation officer is often the sole witness against the probationer. In most cases, the probationer admits the probation violation and witnesses against him generally are not. produced. Sklar, supra, 192, 193.

The informality of revocation hearings outlined above has received wide recognition from the courts as being essential to the effective administration of the probation system. Such informality does not imply deprivation of due process of law. In speaking of parole revocation hearings, where the procedure is similar to that used in revocation of probation, the court in *Jones v. Rivers*, supra, Note 1, at 874, states:

"Due process of law varies widely with circumstances. It is one thing in a prosecution for crime, it is another in administering the parole system. The board of parole must obey applicable legislation but otherwise it is only required to perform its functions fairly, under fair procedures."

The court in the *Jones* case, supra, relied heavily on *Hyser* v. Reed, supra, Note 1, where it was said at 237:

"The Bureau of Prisons' and the Parole Board operate from the basic premise that prisoners placed in their custody are to be rehabilitated and restored to useful lives as soon as in the Board's judgment that transition can be safely made. This is plainly what Congress intends. Thus there is a genuine identity of interest if not purpose in the prisoner's desire to be released and the Board's policy to grant release as soon as possible. Here there is not the attitude of adverse, conflicting objectives as between the parolee and the Board inherent between prosecution and defense in a criminal case."

The language of the federal Probation Act has given the courts no reason to hold differently in probation proceedings. -Section 3653 of Title 18, United States Code, simply requires that "as speedily as possible after arrest the probationer shall be taken before the court for the district having jurisdiction over him." The latest change in probation legislation [18 U.S.C. Rules of Criminal Procedure 32(f)] provides that the court shall not revoke probation except after a hearing at which the defendant shall be present and appraised of the grounds on which such action is proposed. It is important to note what this rule does not include as well as the changes it brought. It would appear that the net result has been to codify the decision of Escoe v. Zerbst, supra, in which this court construed 48 Stat. 256 (now 18 U.S.C., Section 3653), to require that an informal hearing be held with the probationer present before probation is revoked. Nothing is prescribed as to how the hearing should be conducted, but the court in Escoe noted at 295.U.S. 493 that:

"Clearly the end and aim of an appearance before the court must be to enable an accused probationer to explain away the accusation. . . This does not mean that he may insist upon a trial in any strict or formal sense. . . . It does mean that there shall be an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper."

Three years prior to Escoe, supra, the court in Burns v. United States, supra, had made it clear that in the case of revo-

cation of probation the question simply was whether the court had properly exercised its discretion. This decision has led one court to state.

"Since revocation of probation lies within the sound discretion of the sentencing court, United States v., Taylor, 321 F. 2d 339 (4 Cir. 1963), the only question before us is whether the District Court abused its discretion." United States v. Ball, 358 F. 2d 367, 369 (4 Cir. 1966)

It was held specifically in Welsh v. United States, supra, Note 1, that the constitutional right to the assistance of counsel in the defense of a criminal prosecution, given by the Sixth Amendment, does not apply to a hearing on a motion to revoke probation. See cases cited in Note 1, supra.

C. MATERIALS OF DECISION

We have stressed the nature of the probation system, not because it provides all the answers to the issues raised in these cases, but because it reveals a process and suggests an approach. As the petitioner Mempa (No. 424) suggests, the constitutional right to the assistance of counsel has grown with the years and the times. Although the issue of appointing counsel for indigent probationers at revocation of probation hearings has never been decided by this court, it would appear that since the court is not bound by history or verbal logic, it could extend the constitutional right to counsel to such proceedings. The overwhelming majority of the state and federal courts, however, have failed to do so because of the nature of the proceedings and fear of upsetting the purpose for which the probation system was designed to accomplish. See cases cited in Note 1, supra. Such an approach is not a departure from well recognized principles

of due process of law. We agree, as has been pointed out by this court, that due process is the primary and indispensable foundation of independent freedom. Re Gault, supra. But due process does not operate in a vacuum. To say that it requires the appointment of counsel for indigent defendants during the pre-thal and trial stages of a criminal prosecution does not necessarily mean that such should be the case in revocation of probation hearings. It appears that due process requires the appointment of counsel in only those proceedings in which the accused would be at a serious disadvantage through lack of counsel or that, for want of counsel, an ingredient of unfairness would operate actively in the process that results in his confinement. Gideon v. Wainwright, supra.

Certainly the sensibilities and peculiarities of a probationer argue the advisability of being careful not only to treat him fairly, but in such a manner that he will see the fairness of it. This does not argue, however, that it is necessary to go to absurd lengths in the treatment of such defendants at the expense of the probation system. The Utah Supreme Court has stated the problem in the following terms:

"Some practical middle ground should be found between two extremes: On the one hand of compelling a defendant on probation to live in fear that for some trivial reason, or without reason, he may be ordered committed upon someone's whim or caprice; and on the other hand, the ham-stringing of the court so that it cannot with reasonable facility commit a defendant if he deems it proper to do so. Either extreme is undesirable: The first because of its inherent injustice and that it does not correlate with the fundamental objective of probation: rehabilitation. The second because it is so impractical that courts will refuse to place a subject on probation if it is too difficult to com-

mit him if the probation proves unsuccessful." Baine v. Beckstead, 347 P. 2d 554, 559 (Utah 1959).

It is submitted that present revocation of probation procedure, as outlined by the various statutes, represents a practical middle ground not inconsistent with due process of law. In the best interests of the defendant and that of society as well, the courts upon a plea of guilty or after conviction are authorized to place a defendant on probation. See, e.g., 18 U.S.C., Section 3651; F.S. 948.01. A probationer is not free but released under conditions prescribed by the court. Escoe v. Zerbst, supra. He is made aware that if he disregards the conditions of his probation, he may be imprisoned therefor. Thus, the analogy of extending the prison walls to incorporate probationers seems to have some merit. See Curtis v. Bennett, 131 N.W. 2d 1 (Iowa 1964); Benjamin, Due Process and Revocation of Conditional Liberty, 12 Wayne L. Rev. 638 (1966).

Supervision of the probationer is usually provided by a state probation of parole agency. The officers of the agency play important roles in revocation proceedings. If, in the belief of the probation, officer, a probationer has violated conditions of probation, the officer may arrest the probationer, notify the court of such arrest and cause the probationer to be brought before it. (Appendix A, infra.) Investigations are made and written reports are submitted to the court in the vast majority of jurisdictions. Sklar, supra. Notice of the alleged violations is generally given the probationer on or soon after his arrest.

Probation officers are well trained and are fully aware of the objectives of the probation system. They know that maltreatment of probationers has no place in the theory of rehabilitation. It should be remembered that in exercising their discretion, pro-

bation officers use conscientious judgment and do not act arbitrarily.

The ultimate decision to revoke or continue probation, however, is placed in the court after the facts have been presented to it. (Appendix A, infra.) In performing this duty, the courts are afforded wide discretionary powers. As recognized by this court in *Burns v. United States*, supra, at 222:

"The question, then, in the case of the revocation of probation, is not one of formal procedure either with respect to notice or specification of charges or a trial upon charges. The question is simply whether there has been an abuse of discretion and is to be determined in accordance with familiar principles governing the exercise of judicial discretion."

It is realized that a person on probation may be imprisoned if his probation is revoked. It is equally realized that a probationer could have been imprisoned following conviction rather than being placed on probation. The imprisonment which follows revocation does not result from the revocation but from the original conviction. Roberts v. United States, supra; Brown v. Warden, supra, Note 1. This fact does not argue against judicial fairness in revocation hearings. It does point out one thing, however: Probationers are convicted criminals under the supervision of the court and probation authorities. Consequently, just as prison officials must have effective control and authority in order to maintain an effective prison program, probation officials must have the same degree of control and authority over probation programing and administration. Given these circumstances, we think the procedures outlined above comply with judicial fairness and are not inconsistent with due process of law.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that due process of law does not require the appointment of counsel for indigent probationers at revocation hearings.

Respectfully submitted,

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APPENDIX A

CLASSIFICATION OF PROBATION STATUTES

1

Statutes Expressly Authorizing Revocation Without a Hearing

State	Statutes	Comments
Iowa	Iowa Code Ann. Sec. 247.26 (1966)	Probation may be revoked "with- out notice" to probationer.
Missouri	Mo. Ann. Stats. Sec. 549.101 (1963 Supp.)	Court "may in its discretion with or without a hearing" order the probation revoked.
Oklahoma	Okla. Stats. Ann. tit. 22, Sec. 992 (1961)	Probationer arrested and "delivered forthwith" to the place to which originally sentenced.
		originally schemed.

11

Statutes Whic	b Do Not Indicate Not Req	Whether a Hearing Is or Is uired
Arizona	Ariz. Rev. Stats. Sec. 13-1657(B) (1957)	The court may "in its discretion," issue a warrant for the rearrest of probation violator and may thereupon revoke and terminate probation.
Arkansas	Ark. Stats. Ann. Sec. 43-2324 (1964 Replacement)	Court may "at any time during the period of suspension revoke the same and order execution of the full sentence."
California	Cal. Penal Code Secs. 1203.2, 1203.3 (1963 Supp.)	Any peace officer may arrest pro- bationer and "bring him before the court," or the court may in its discretion arrest and thereupon re- voke probation.

State Statutes Comments District of D.C. Code Court may revoke the order of Columbia Sec. 24-104 (1961) probation and cause the rearrest of the probationer. Massachusetts Mass. Ann. Laws Probation officer may arrest pro-Ch. 279 Sec. 3 (1956) bationer and "take him before" the court. Nebraska Neb. Rev. Stats. Court may issue warrant for the arrest of probationer and impose Sec. 29-2219(3) (1964 Reissue) any penalty which it might have originally imposed. South Dakota S.D. Code Court may revoke the suspension Sec. 34-3708-2 (1960) of sentence at any time during probationary period and impose and execute sentence. Utah Utah Code Ann. Person in charge of probationer Sec. 77-62-37 (1953) shall report probation violation to the court and make such recommendations as are expedient in the case. III Statutes Which Imply That a Hearing Is to Be Held. Alaska Alaska Stats Sec. 33.05.070(b) (1966)Nevada Nev. Rev. Stats. Sec. 176.330 (1965)

Pennsylvania

Pa. Stats. Ann. tit. 19, Sec. 1084 (1964)

Rhode Island

R.I. Gen. Laws Secs. 12-19-9, /12-19-14 (1966 Supp.)

"As speedily as possible after arrest, the probationer shall be taken before the court

The court shall cause the defendant to be brought before it, and . may continue or revoke the probation.

Probationer shall be arrested and brought before the court which. released him.

Attorney General shall cause the defendant to appear before the court. Probation may be revoked in open court, in defendant's presence and upon facts from police or probation officer.

State Statutes Comments Virginia Va. Code Sec. 53-275 Court may, "for any cause deemed (1967 Replacement) by it sufficient" cause the defendant to be arrested and brought before it. Washington, Wash, Rev. Code The court may in its discretion Sec. 9.95.220 without notice revoke and termi-(1965 Supp.) nate probation. Wisconsin Wis. Stats. Ann. Probation department may order Secs. 57.03, 57.04(2) probationer brought before the (1965)court. Wyoming Wyo. Stats. Sec. 7-321 As soon as practicable after arrest (1959)the court shall cause the defendant to be brought before it. Kentucky Ky. Rev. Stats. Probation officer shall present Sec. 439.300(1) written report to the court show-(1963)ing nature of violation. The court shall cause the defendant to be brought before it. Mississippi Miss. Code Ann. Court shall cause the defendant to Sec. 4004-25 be brought before it after submis-(1966 Supp.) sion of probation officer's report of violations.

IV

Statutes Which Expressly Require a Hearing

* *		1
Alabama *	Ala. Code tit. 42, Sec. 24 (1958)	Probation officer shall submit in writing the nature of violation. The court, after a hearing, may revoke probation.
Colorado	Golo. Rev. Stats. Ann. Sec. 39-16-9 (1963)	Probation officer shall conduct investigation of alleged violation

tion.

and submit report to court which after hearing may revoke proba-

State	Statutes	Comments
Connecticut	Conn. Gen. Stats. Ann. Sec. 54-114 (1958)	Probationer given notice of alleged violations. Officer submits report to court which may revoke proba- tion after hearing.
Illinois	Ill. Ann. Stats. Ch. 38; Sec. 117-3 (1965)	The court shall conduct a hearing on the issue of the probation violation.
Indiana	Ind. Stats. Ann. Sec. 9-2211 (1956)	Probation officer may arrest pro- bationer. "Thereupon, the proba- tioner shall forthwith be taken before the court for hearing."
Maryland	Charter & Public Local Laws of Baltimore City Sec. 279 (Flack 1947)	The revocation of probation in Maryland is primarily handled on a local level. Hearings are generally required.
Maine	Me. Rev. Stats. tit. 44, Sec. 1633 (1964)	State Probation and Parole Board reports violation to court which after hearing may revoke proba- tion.
New York	N.Y. Code Crim. Proc. Sec. 935 (1958)	After an opportunity to be heard the court may revoke, continue or modify probation.
North Dakota	N.D. Cent. Code Secs. 12-53-11, 12-53-15 (1967 Supp.)	Probationer shall be brought be- fore the court for a hearing upon the alleged violation.
Ohio	Ohio Rev. Code Ann. Secs. 2951.08, 2951.09 (1964)	Probation officer may arrest pro- bationer and bring him before the judge or magistrate before whom the cause was pending.
South Carolina	S.C. Code Secs. 55-595, 55-596 (1962)	Probation officer must submit a report showing manner of viola- tions. After hearing court may re- voke probation.
Texas	Texas Code Crim.	

1 exas

Texas Code Crim. Proc. Art. 781d, Sec. 8 (1962 Supp.)

Statutes Which Expressly Provide That Hearing May Be "Summary" or "Informal"

State	Statutes .	Comments
Delaware A	Del. Code Ann. tit. 11, Sec. 4335 (c) (1966)	Process issued for probationer's arrest whereupon "the court shall cause the probationer brought before it without unnecessary delay, for a hearing The hearing may be informal or summary." Court after "summary hearing," may revoke probation.
Kansas	Kan. Stats. Ann. Sec. 62-2244 (1964)	The court shall cause the defend- ant to be brought before it for a hearing which may be informal or summary.
Louisiana	La. Rev. Stats. 15-534(c) (1962 Supp.)	The court shall cause the defend- ant to be brought before it with- out unnecessary delay for a hear- ing. The hearing may be informal or summary.
Montana	Mont. Code Sec. 94-9831 (1967 Supp.)	
New Hampshire	N.H. Rev. Stats. Ann. Sec. 504:4 (1955)	The court, after summary hearing, may make such orders as justice requires.
New Jersey	N.J. Stats. Ann. Sec. 2A:168-4 (1953)	The court, after summary hearing, may continue or revoke probation.
Oregon	Ore. Rev. Stats. Sec. 137.550(2) (1965)	If in judgment of probation officer probationer has violated probation, he may be arrested and brought before the court which, after sum- mary hearing, may revoke proba- tion,

State

Statutes

Comments.

Vermont

Vt. Stats. Ann. tit. 28, Sec. 1015 (1958) When probation officer believes probationer has violated probation, he shall bring him before the court which may inquire summarily into conduct of probationer.

West Virginia

W.Va. Code Sec. 62-12-10 (1965) If there is reasonable cause, probation officer may arrest probationer and bring him before the court for a summary hearing.

VI

Statutes Which Expressly Guarantee Certain Elements of a Fair Hearing

Florida

Fla. Stats. Ann. Sec. 948.06 (1965) Upon reasonable ground any parole or probation supervisor may arrest probationer without a warrant. Probationer granted hearing before court and opportunity to be heard in person or by counsel.

Georgia

Ga. Code Ann. Sec. 27-2713 (1966 Supp.) Probation officer may arrest probationer without warrant and return him to the court where he will be given an opportunity to be heard in person or by counsel.

Hawaii

Hawaii Rev. Laws Secs. 258-53, 258-56 (1955) Court having jurisdiction may demand defendant to show cause why sentence should not be imposed and executed.

Michigan

Mich. Stats. Ann. Sec. 28-1134 (1954) "Summary and informal" hearing, with "a written copy of the charges" given to the probationer prior to the hearing.

Minnesota

Minn. Stats. Ann. Sec. 609.14 (1965) If grounds for revocation are brought in issue by the defendant, a summary hearing shall be held State

Statutes

Comments

thereon at which probationer is entitled to be heard and to be represented by counsel.

New Mexico

N.M. Stats. Ann. Sec. 40A-29-20 (1963) Alleged violations read to probationer who may admit or deny same; if he denies them, he is to be "furnished a copy of the petition" to revoke and a hearing is set.

North Carolina

N.C. Gen. Stats. Secs. 15-200, 15-201 (1965) Probationer informed of the intended revocation and, at his request, the court "shall grant a reasonable time for the defendant to prepare his defense."

Tennessee

Tenn. Code Sec. 40-2907 (1966 Supp.) Defendant must be present and shall be entitled to be represented by counsel and shall have the right to introduce testimony in his behalf.

LIBRARY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 16 & No. 22

JERRY DOUGLAS MEMPA,

Petitioner.

B. J. RHAY, Superintendent, Washington State Penitentiary,
Respondent.

WILLIAM EARL WALKLING.

Petitioner,

B. J. RHAY Superintendent, Washington State Penitentiary,
Respondent.

On Writs Of Certiorari To The Supreme Court Of Washington

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

TOGETHER WITH BRIEF AMICUS CURIAE

LEE SILVERSTEIN, PATRICK J. HUGHES, JR., 1155 East 60th Street, Chicago, Illinois 60637,

> Attorneys for Amicus Curiae NATIONAL LEGAL AID AND DEFENDER ASSOCIATION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 16 & No. 22

JERRY DOUGLAS MEMPA,

Petitioner,

B. J. RHAY, Superintendent, Washington State Penitentiary,
Respondent.

WILLIAM EARL WALKLING,

Petitloner.

B. J. RHAY, Superintendent, Washington State Penitentiary,
Respondent.

On Writs Of Certiorari To The Supreme Court Of Washington

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

The National Legal Aid and Defender Association hereby respectfully moves for leave to file a brief amicus curiae in these cases in support of petitioners, as provided in Rule 42 of the Rules of the Court. The consent of the attorneys for the petitioners has been obtained. The consent of the Attorney General of the State of Washington, attorney for the respondents, was requested but refused.

The National Legal Aid and Defender Association, hereinafter called NLADA, is a non-profit corporation whose primary purpose is to assist in providing more and better legal services for the poor. The NLADA includes among its members the great majority of defender offices, coordinated assigned counsel systems, and legal aid societies in the United States, many of which are providing legal representation to indigent defendants at probation violation proceedings. The NLADA also has 1700 professional members, many of whom are practicing attorneys who represent indigent persons in criminal and civil matters.

The NLADA and its members believe that it is vital to the administration of criminal justice that counsel be provided for poor persons at every stage in a criminal proceeding, including a hearing on violation of probation. For this reason the NLADA desires to assist the Court in giving careful and full consideration to the issues presented in these two cases.

The brief for the petitioners necessarily and quite properly views the issues in the two cases primarily from the vantage point of Washington law. The NLADA in its brief, tendered herewith, attempts to cast light on the issues from a national perspective. The brief includes material drawn from the statutes and case law of the several states, scholarly writings, model legislation, original field research conducted by the American Bar Foundation in 1963-64, and questionnaires circulated by NLADA

in 1967 among its defender members as well as some prosecutors and probation offices. It is believed that the NLADA brief includes material supplemental to the petitioners' brief that should be useful to the Court in its consideration of these cases.

In view of the importance of these cases to defender and legal aid attorneys serving the poor throughout the country, the Defender Committee and the executive committee of NLADA have authorized and instructed the NLADA staff attorneys to prepare and file a brief amicus curiae in these two cases, if so permitted by the Court.

Wherefore, it is respectfully prayed that this motion for leave to file the annexed brief amicus curiae be granted.

/s/ LEE SILVERSTEIN,

/s/ Patrick J. Hughes, Jr.,

1155 East 60th Street, Chicago, Illinois 60637,

Attorneys for Amicus Curiae
National Legal Aid and
Defender Association.

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NATIONAL LEGAL AID AND DEFENDER ASSOCIATION
AMICUS CURIAE

INTEREST OF AMICUS CURIAE.

As pointed out in the Motion For Leave To File its Brief Amicus Curiae, the National Legal Aid and Defender Association, hereinafter referred to as NLADA, and its members have a real and vital concern in these cases, since an adverse decision would seriously impair the ability of the members of NLADA to represent indigent clients in such proceedings. NLADA officially takes the position that every jurisdiction should have an adequate defense system to provide competent legal representation for those financially unable to employ counsel. Accordingly NLADA has promulgated Minimum Standards for a Defender System, as adopted by its Assembly of Delegates. These standards have been endorsed by the Standing Committee on Legal Aid and Indigent Defendants of the American Bar Association and approved by its House of Delegates, 91 A.B.A. Reports, 116, 186, 189-90 (1966). In their particularly relevant portions these standards provide:

Every Defender System should:

- 1. Provide legal representation for every person who is without financial means to secure competent counsel when charged with a felony, misdemeanor, or other charge where there is a possibility of a jail sentence.
- 3. Provide representation immediately after the taking into custody or arrest, at the first and every subsequent court appearance and at every stage in the proceeding, including appeal or other post-conviction proceedings to remedy error or injustice. The representation should extend to parole and probation-violation proceed-

ings, extradition proceedings, and proceedings involving possible detention or commitment of minors or alleged mentally ill persons.

8. Provide effectual notice of the available services to all persons whom may be in need thereof. [Emphasis added.] (These standards, adopted in 1965, are published in the *Handbook of Standards for Legal Aid and Defender Offices* (1965), NLADA, American Bar Center, Chicago, Ill. 60637 and in 24 Legal Aid Brief Case 66-67 (1965).)

These minimum standards represent the crystallized sentiment of NLADA and its members. The whole legal aid and defender movement will be affected by the determination of these cases, since this will be the first time this court will directly rule on the issue of the right of an indigent to counsel at a probation revocation proceeding.

STATEMENT OF THE CASES.

The essential facts in these two cases are similar. In each instance the defendant pleaded guilty to a serious crime and was placed on probation, the imposition of sentence being suspended. (M.R. 10, 20; W.R. 13) Mempa, Petitioner in No. 16, was arrested four months afterwards, while still only 17 years old, and his probation was revoked after a brief hearing in which the State was represented by counsel but he was not. (M.R. 24-28.) He was not told that he had a right to counsel, and apparently

no effort was made to contact the attorney who had represented him as assigned counsel when he pleaded guilty. At the end of the hearing the judge sentenced Mempa to the state reformatory for a maximum of ten years on the original guilty plea. Six years later, still being a prisoner, Mempa filed a habeas corpus petition in the Washington Supreme Court, the denial of which formed the basis for grant of certiorari by this Court.

The Walkling case, No. 22, which arose in another county, differs in that Walkling was older and apparently wiser, for he had asked counsel to be present to represent him at the probation revocation proceeding. (W.R. 15.) Counsel did not appear, however, and after waiting 15 minutes the judge proceeded, despite Walkling's repeated request that the judge appoint counsel for him. At the end of a brief hearing in which the State was represented by counsel but Walkling was not, the judge revoked the probation and imposed a maximum sentence of 15 years on the original guilty plea. (W.R. 15-16.) After two years of imprisonment Walkling also filed a habeas corpus petition, with the same results as Mempa. Walkling, however, was released on parole in 1967.

For a fuller statement of the cases, we adopt the Petitioners' statement.

SUMMARY OF ARGUMENT.

To permit a defendant of means to employ counsel for a probation violation hearing but deny to a poor person the right to have counsel appointed is contrary to the Equal Protection Clause of the Fourteenth Amendment. This Court has previously recognized that the Equal Protection clause applies to appointment of counsel for appeal in Douglas v. California, 372 U.S. 353 (1963) and related cases, and state courts in Alaska and Oregon have applied this principle to probation violation proceedings. The problem of equal access to counsel occurs in at least 17 states besides Washington and the number may be as high as 31.

Quite apart from the Equal Protection clause; the Due Process clause requires that counsel be assigned at probation violation proceedings. The principle of Gideon v. Wainwright, 372 U.S. 335 (1963) is broad enough to cover these proceedings. Further, ten states, by judicial decision, statute, or rule of court, now require appointment of counsel, thereby recognizing that counsel is necessary as a matter of public policy if not constitutional law. Most states grant the defendant a right to be heard, and the state is represented at the hearing by counsel, so that the defendant is at an unfair disadvantage if he does not also have counsel. Expert professional opinion, such as the President's Crime Commission and the American Bar Association, have recommended that appointed counsel be provided. Scholarly writing on the subject shows a growing recognition of the importance of counsel, especially in the present decade.

If the Court should require appointment of counsel, the state courts would not be unduly burdened because about half the courts are already appointing counsel, either because state law requires it or because of local practice. The total number of revocations per year appears to be at a level where adequate representation could be provided within existing systems for furnishing counsel to the poor.

Probation begins with an exercise of judicial discretion or favor, but it does not follow that the status of probation may be taken away without certain safeguards. Probation is best defined as a form of liberty, but even if defined as a privilege, it is entitled to at least the same protections as economic privileges, such as the right to practice law and the right to work for the federal government.

ARGUMENT.

I.

THE EQUAL PROTECTION CLAUSE REQUIRES THAT COUNSEL BE ASSIGNED TO AN INDIGENT DEFENDANT IN A PROBATION VIOLATION PROCEEDING IF A DEFENDANT OF MEANS COULD EMPLOY PRIVATE COUNSEL FOR SUCH PROCEEDING.

A. The principle expressed in Douglas v. California and related cases, requiring appointment of counsel for appeal, applies to appointment of counsel in a probation violation proceeding.

As pointed out on page 30 of the Petitioners' brief, the general practice in the State of Washington is to allow retained counsel at probation revocation proceedings. In unmistakable language, this Court has indicated that where the liberty of the individual is involved, it will not sanction discrimination between indigents and those who possess the means to protect their rights. In a series of decisions dealing with discrimination against an indigent defendant beginning with Griffin v. Illinois, 351 U.S. 12 . (1956) and including Douglas v. California, 372 U.S. 353 (1963), Lane v. Brown, 372 U.S. 477 (1963), and Anders v. California, 386 U.S. 738 (1967), this court has consistently invalidated procedures wherein the rich man has the benefit of counsel at the critical stages in a criminal prosecution while the poor man "is forced to shift for himself." Anders v. California, 386 U.S. at 741. Anders held that substantial equality and fairness required by the Fourteenth Amendment imposed a duty on California to afford an indigent appellant in a criminal case the

same degree of advocacy that a non-indigent can obtain by virtue of his ability to employ counsel, 386 U.S. at 745.

. The Supreme Courts of Alaska and Oregon have discussed the right of an indigent to counsel in probation revocation proceedings in the light of the equal protection clause and the decisions cited above. In Hoffman v. State, 404 P. 2d 644 (Alaska 1965), an indigent defendant was sentenced to three years imprisonment after pleading guilty to burglary and larceny. However, the judge suspended all but five months of that sentence, placing the defendant on probation for the remaining time. While he was on probation, the state filed a petition with the trial court alleging that he had violated his probation. The court then held a probation revocation hearing at which the defendant, being without funds, was not represented by counsel, even though Alaska Statutes § 12.55.110 provides that a defendant has the right to counsel in such a proceeding. Upon the conclusion of the hearing, the court revoked probation and imposed the balance of the threeyear sentence.

On appeal the Supreme Court of Alaska decided that under the statute an indigent probationer had the same right to be represented by counsel as a probationer who had funds to retain counsel. The Court said:

To construe * • [the statute] as embodying an intended dichotomy between probationers able to afford counsel and others, would, in our opinion, render the statute repugnant to the Equal Protection Clauses of both the Federal and Alaska Constitutions. Hoffman v. State, 404 P. 2d at 646.

The Alaska Court then pointed to this Court's opinions in Lane, Douglas, and Griffin as having struck down the

distinctions between the indigent and the man of means. With respect to these decisions, the Court said:

Admittedly these three decisions involved appeals in criminal cases and were not concerned with probation or parole issues, but as was observed by Judge Sobeloff, in reference to these cases in his concurring opinion in Jones v. Rivers, 338 F. 2d 862 at 876 (4th Cir. 1964): "[T]here is no reason to attach significance to their technical classification as criminal rather than civil; the underlying feature to be noted is the fact that the liberty of the individual was involved."

What we do today is to refuse to sanction any discriminatory application between indigent probations and others in the administration of the right to counsel * * *. Hoffman v. State, 404 P. 2d at 646.

In Perry v. Williard, 427 P. 2d 1020 (1967) the Oregon Supreme Court was faced with the same issue. The Oregon practice with respect to the assistance of counsel at probation revocation proceedings was similar to the practice in the State of Washington in these cases. Those who could afford to employ counsel for probation revocation hearings did so frequently. Those who were indigent did not. The defendant Perry, an indigent, was sentenced after his conviction of a felony, but the sentencing court stayed the execution of the sentence and placed him on probation. Subsequently, at a hearing held without the presence or assistance of counsel, his probation was revoked. The Oregon Supreme Court, in reversing the trial court, discussed the applicability of the Equal Protection clause:

The prisoner argues and the state does not deny that it is not unusual for a probationer who can retain counsel to have the assistance of counsel at a revocation hearing. The presence of counsel in some cases when it is denied in others gives rise to equal protection problems. See *Douglas* v. *California*, 372 U₂S. 353 (1963); Kamisar and Choper, The Right to Counsel in Minnesota, Some Field Findings and Legal Policy observations, 48 Minn. L. Rev. 1, 94 (1963). [427 P. 2d at 1021-22.]

Recent decisions in our own court as well as the United States Supreme Court have been widening and deepening our commitment to individual liberty and to equality before the law. * * It would be somewhat surprising now to hold for the first time that a wealthy person brought before the court for revocation of probation could not have the assistance of retained counsel to dispute the alleged grounds for revocation. We take judicial notice of the practice of many years standing which allows counsel to be heard in such proceedings in various circuit courts of this state. We now hold that counsel is not only desirable but is so essential to a fair and trustworthy hearing that due process of law when liberty is at stake includes a right to counsel.

Accordingly, if a probationer with money is entitled to retained counsel, an indigent is entitled to appointed counsel. As observed in another context, discrimination on account of poverty is as unjustifiable as discrimination on account of religion, race or color. [Citing Griffin v. Illinois] We are aware that a proceeding to review performance on probation is not a criminal trial, but that distinction does not justify the denial of equal protection of the laws where liberty is concerned. Perry v. Williard, 427 P. 2d at 1022-23 [emphasis added].

The Oregon Supreme Court returned the case to the trial court for a new revocation hearing in which counsel should be available unless expressly waived.

A similar argument was made by Judge Hamilton in his dissent in *Mempa* v. *Rhay*, no. 16, transcript, M.R. 57, *Mempa* v. *Rhay*, 416 P. 2d at 114, but was rejected by the majority of the Supreme Court of Washington. With respect to the majority's position, Judge Hamilton stated:

Yet the majority would deny this right to indigents, thereby projecting discrimination between probationers who can afford counsel and those who cannot. Due process and equal protection prohibit the accident of economic ability from being a criterion for right to counsel.

Of the several state court decisions denying a right to appointed counsel, to be discussed below in part II of our brief, only one, Shum v. Fogliani, 413 P. 2d 495 (Nev. 1966) deals with the issue of equal protection, and even there one judge of a three-judge court wrote a strong dissent. In Shum the court relied on the theory that probation is a matter of grace, which we discuss below in part IV of our brief.

B. A significant number of states other than Washington permit retained counsel in probation violation hearings but deny a right of assigned counsel.

We have collected information about the law and practice in courts located in all the states, utilizing the most recent data available from a variety of sources. This material appears in Appendix A. As shown in this Appendix, according to the practice in 17 states besides Washington, a probationer charged with a probation violation is entitled to have private retained counsel at the proceedings to revoke his probation but is denied a right to have counsel appointed if he is poor, except perhaps in one

or a few counties in the state, or where he makes a request for counsel, or depending on the policy of the individual judge who happens to hear the case. These states, according to the best information available, are Alabama, Arizona, Arkansas, Florida, Kentucky, Idaho, Iowa, Louisiana, Maine, Michigan, Nevada, New Hampshire, Ohio, South Carolina, Tennessee, Vermont, and Wyoming. The problem almost certainly occurs also in 12 other states, in certain counties: California, Colorado, Georgia, Indiana, Maryland, New Jersey, New York, North Carolina, Oklahoma, South Dakota, Utah, and Virginia, and probably also in Kansas and Nebraska.

Because the problem of lack of equal access to counsel seems so widespread among the states, the Court should declare that failure to appoint counsel violates the Equal Protection Clause. In *Douglas* v. *California*, 372 U.S. 353 (1963), this Court declared that although the Constitution does not require that the state provide a right of appeal, if it does so, then counsel must be provided for an indigent appellant if he wants one, so that he will still stand on the same footing as a defendant of means. Similarly, as the issue is framed in the present cases, this Court can rule that if the state permits retained counsel in a probation violation proceeding, it must also furnish appointed counsel for the probationer who is indigent:

II.

APART FROM EQUAL PROTECTION REQUIREMENTS, THE DUE PROCESS CLAUSE REQUIRES ASSIGNMENT OF COUNSEL

A. A significant number of states recognize this principle by judicial decision, statute, or rule of court.

In the Petitioners' brief, pages 16-28 and/31-35, they set forth their position that the Due Process Clause requires that right to counsel at a probation violation proceeding be co-extensive with the right to counsel established in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

As Petitioners point out, the sentencing that follows a revocation of probation where the original sentence had been deferred is the sentence on the original charge and is as much a part of the criminal prosecution as the arraignment and trial. Such revocation proceedings are therefore unquestionably a "critical" stage of the criminal process.

In view of Petitioners' discussion of these points we will omit discussion of them.

We do wish to point out, however, that ten states have recognized the principle that counsel ought to be appointed in probation violation proceedings as a matter of fundamental fairness to the defendant. A detailed summary of the law in each state appears in the "assigned counsel" portions of Appendix A. The table shows judicial decisions in Illinois, New Mexico, New York (4th Dept.), Oregon, Pennsylvania, and Wisconsin. Massachusetts has a judicial decision to this effect construing a rule of court. Statutes requiring appointment of counsel have been enacted in Hawaii, Minnesota, and Texas: Alaska should probably be added to the list, since its Supreme Court

has construed its statute as requiring appointment of counsel, albeit on a theory of equal protection. These eleven states are located in all sections of the country and include four of the ten most populous states and about one fourth the total population of the United States, according to the 1960 census.

Furthermore, although not required to do so by any statute, judicial decision, or statewide rule of court, many individual courts are appointing counsel, as shown in Appendix A. This is further evidence that the Due Process principle is widely recognized and followed in practice.

The state cases deserve careful attention, for they show that the Due Process principle has been applied both to cases arising from an original suspension of the imposition of sentence and cases arising from an original suspension of the execution of sentence. The following cases applied the principle where the imposition of sentence was suspended:

Gebhart v. Gladden, 243 Ore. 145, 412 P. 2d 29 (1966); People v. Price, 24 Ill. App. 2d 364, 164 N.E. 2d 528 (1960); Smith v. State, 33 Wis. 2d 695, 148 N.W. 2d 39 (1967). In Re Levi, 39 Cal. 2d 41, 244 P. 2d 403 (1952); In Re Perez, 53 Cal. Rep. 414, 418 P. 2d 6 (1966). In the following cases execution of sentence was suspended: People v. Hamilton, 26 A.D. 2d 134, 271 N.Y.S. 2d 694 (4th Depterment), Williams v. Commonwealth, 350 Mass. 732, 216 N.E. 2d 779 (1966); Blea v. Cox, 75 N.M. 265, 403 P. 2d 701 (1965); Perry v. Williard, 427 P. 2d 1020 (Ore. 1967). None of the three statutes providing a right to assigned counsel makes any distinction between the two types of revocation, and the Minnesota Statutes, §§ 611.14 subd. (c) and 609.14 even refer to both fact situations. Massachusetts Supreme Judicial Court Rule 10 simply applies

to any crime "for which a sentence of imprisonment may be imposed." Cf. Com. ex rel. Remeriez v. Maroney, 415 Pa. 534, 204 A. 2d 451 (1964) (type of suspension of sentence not shown).

We submit that there is no distinction between the two types of sentencing imposed upon revocation of probation. The two decisions in Oregon are particularly instructive: the Oregon Supreme Court could see no distinction between a case of suspension of the imposition of sentence, Gebhart v. Gladden, 243 Ore. 145, 412 P. 2d 29 (1966), which is like the two cases at bar, and a case of suspension of the execution of sentence. Perry v. Williard, 427 P. 2d 1020 (Ore. 1967). In either fact situation the liberty of one convicted of a serious crime is at stake, and the proceeding is clearly either a part of the criminal prosecution or a closely related matter. The right of counsel must be extended to these proceedings if the Court is to be consistent with its previous decisions relating to other stages in the criminal process, such as Miranda v. Arizona, 384 U.S. 436 (1966); Gilbert v. California, 87 Sup. Ct. 1951 (1967); Hamilton v. Alabama, 368 U.S. 52 (1961); White v. Maryland, 373 U.S. 59 (1963); Gideon v. Wainwright, 372 U.S. 355 (1963); Townsend v. Burke, 334 U.S. 736 (1948); Douglas v. California, 372 U.S. 353 (1963); Anders v. California, 386 U.S. 738 (1967).

A discussion of the Due Process issue is incomplete without reference to the state decisions that deny a right to assignment of counsel. Two of these, Edwardsen v. State, 220 Md. 82, 151 A. 2d 132, 136 (1959), and People v. St. Louis, 3 A.D. 2d 883, 161 N.Y.S. 2d 170 (3d Dept. 1957) may be discredited as being decided several years before the Gideon and related decisions. The language of the Maryland case clearly shows that the court's thinking

was dominated by Betts v. Brady, 316 U.S. 455 (1942); the New York case barely discusses the question and cites no authority. The case of Phillips v. State, 165 So. 2d 246 (Fla. App. 2d Dist. 1964) denies a right to assigned counsel at a probation revocation hearing but recognizes a right at the sentencing that follows upon a revocation. Neither Phillips nor Thomas v. State, 163 So. 2d 328 (Fla. App. 3d Dist. 1964) affords much discussion of the question. Chief reliance is on Florida precedents and a District of Columbia Circuit decision denying appointed counsel in a federal parole revocation proceeding. People v. Wood, 2 Mich. App. 342, 139 N.W. 2d 895 (1966) does not venture beyond Michigan authorities and a Seventh Circuit decision denying a right to appointed counsel in federal parole revocation. The Due Process issue is scarcely considered. In Thomas v. Maxwell, 175 Ohio St. 233, 193 N.E. 2d 150, 152 (1963) a right to assigned counsel is denied but a right to retained counsel is recognized. The court relies entirely on Federal decisions stemming from the dictum in Escoe v. Zerbst, 295 U.S. 490 (1935), that there is no constitutional but only a statutory right to a hearing under the federal probation statute. See Petitioners' brief p. 26. Another case citing the same type of authorities is Shum v. Fogliani, 413 P. 2d 495 (Nev. 1966), a 2-1 decision. Finally the case of Franklin v. State, ·87 Idaho 291, 392 P. 2d 552, 555 (1964), also relying on federal decisions, seems to deny even a right to retained counsel. Additional authority contrary to our position may be found in state cases denying a right to a hearing; a fortiori, these cases are inconsistent with a right to have assigned counsel at such a hearing, e.g., State v. Small, 386 S.W. 2d 379 (Mo. 1965); Ex Parte Davis, 37 Cal. 2d 872, 236 P. 2d 579 (1951) (suspension of execution of sentence.)

We submit that these decisions are wrong and that the state authorities previously discussed present the better view for the reasons already mentioned.

B. Most state courts conduct a hearing on the issue of violation of probation, at which the defendant is present and has a right to be heard, and at which the state is represented by counsel. The defendant is at an unfair disadvantage if he does not have the assistance of counsel.

An excellent study of probation and parole revocation statutes and practices was made in 1962 by Ronald Sklar. The Revocation of Parole and Adult Probation, available by interlibrary loan from Northwestern University School of Law, Chicago; see condensed version, "Law and Practice in Probation and Parole Revocation Proceedings," 55 J. Crim. Law, Crim. & Pol. Sci. 175 (1964). Sklar's summary of the statutory provisions is still accurate with a few exceptions. (*) As updated, Sklar's summary shows

^(*) Delaware Code Ann., § 4335(c), enacted in 1964, provides for an informal or summary hearing on a violation of probation. Thus Delaware moves from group I to group V in the Sklar table in 55 J. Crim. L., Crim. & P.S. 176-182. The Indiana statute was amended in 1967 so as to provide that the probationer "may be represented by counsel of his choice." This would move Indiana from group IV to group VI. The new Texas Code of Criminal Procedure, art. 42.12, § 8 continues the requirement of a hearing, and § 3b adds a provision for retained or assigned counsel. Thus Texas would also move from group IV to group VI. Minnesota and Hawaii have enacted statutes providing for assignment of counsel, although the probation provisions have not been changed. See Appendix A. In other states the section numbers have been altered by recompilations, reenactments, etc. No attempt is made here to report changes in parole statutes listed by Sklar.

the following: Only three states authorize revocation without a hearing (Iowa, Missouri, Oklahoma). Seven states and the District of Columbia have statutes that do not indicate whether a hearing is required (Arizona, Arkansas, California, Massachusetts, Nebraska, South Dakota, Utah), although as shown in the Appendix, court decisions in several of these states require that a hearing be held. The statutes of seven states imply that a hearing is required, usually by a provision that the probationer is to be brought before the court (Alaska, Kentucky, Mississippi, Nevada, Pennsylvania, Rhode Island, Virginia, Washington, Wisconsin, Wyoming). In most of these states the supreme courts have ruled that a hearing is to be held. This Court has so construed a similar provision in . the federal statute. Escoe v. Zerbst, 295 U.S. 490 (1935). The statutes of all the remaining states expressly require hearings, although some statutes provide that the hearing may be summary or informal, or they have other special provisions about the hearing. The state court decisions are collected in an annotation in 29 A.L.R. 2d 1074-1140 (1953) and Supplemental Service. Cf. Note, "Legal Aspects of Probation Revocation," 59 Colum. L. Rev. 311 (1959); Comment, "Due Process and Revocation of Conditional Liberty," 12 Wayne L. Rev. 638 (1966).

The longer version of Sklar's study has much factual data based on answers to questionnaires sent to state probation offices or, in some instances, offices in the most populous counties of a state. The study reveals that it is a universal practice to have the probationer present and that virtually everywhere he is permitted to make a statement and present evidence by witnesses or otherwise. One may ask, how can he do this effectively without the

assistance of counsel? A right to cross-examine witnesses produced by the state is also recognized in most jurisdictions. And how valuable is this right without the aid of counsel? See *Pointer* v. *Texas*, 380 U.S. 400 (1965). In most states a written report is submitted to the court by the probation officer, and in some states the probationer is allowed to see a copy of it. But how effectively can the typical indigent defendant oppose such a report without the aid of a lawyer?

The National Legal Aid and Defender Association, as a part of its preparation for this case, circulated questionnaires among its defender members and among prosecutors and probation offices located in the same cities as the defender members. These were supplemented by questionnaires to probation offices in large cities not already included. Responses were received from 53 defender members located in 19 states; from 37 prosecutors in 15 states; and from 50 probation offices in 23 states, including several statewide probation offices.

Responses from the defender members and prosecutors show that the state is regularly represented in probation violation proceedings in their local courts in 15 states and the District of Columbia. The states are California, Colorado, Connecticut, Florida, Illinois, Indiana, Minnesota, Missouri, Nevada, New York, Ohio, Pennsylvania, Texas, Utah, and Wyoming. Respondents from offices in four states report that the state is sometimes represented (Arizona, California, New York, Ohio), while respondents from six states said the state is not represented. The fact that some states (Colorado, Kansas, Maryland, Missouri, Ohio, Pennsylvania) are listed more than once indicates a disparity in practice from one coun-

ty or judicial circuit to another. These returns, while not conclusive, are sufficient to show that in a significant number of jurisdictions the state regards the probation violation hearing as sufficiently important and complex to have its lawyer there either regularly or in some cases. Indeed, this is just what occurred in the two cases before the Court. See the transcript in *Mempa* v. *Rhay* (M.R. 24-27), and in *Walkling* v. *Rhay* (W.R. 15-18).

We will not belabor the point that the defendant is at a serious disadvantage in a proceeding where the state has counsel but he has none, and where he has a right to a hearing but cannot have counsel to assist him. This point is thoroughly covered in Petitioners' brief at pages 22-25. We would, however, point out to the Court that this problem exists not only in Washington but in several other states as well. As shown in Appendix A, in ten states where there is no right to assigned counsel, the responses indicate that the state has counsel regularly or at least "sometimes." The states where this one-sided arrangement prevails, at least in some counties, are Arizona, California, Colorado, Florida, Indiana, Missouri, Nevada, Ohio, Utah, and Wyoming. It is probably safe to say that the same situation can be found in most if not all the other states where a right to assigned counsel is denied.

C. Expert opinion favors a right of assigned counsel for probation violation proceedings.

The overwhelming weight of informed expert, opinion supports the position that assigned counsel should be provided for a probation violation proceeding. The recent report of the President's Commission on Crime and the Administration of Justice takes this position. The Commission reported:

The criminal trial process is not the only one in which a person may be deprived of his liberty. The revocation of probation and parole presents an equal threat, and though the legal issues in such proceedings are seldom complicated, the factual issues may be

The Commission recommends:

Legal assistance should be provided in parole and probation revocation proceedings—The Challenge of Crime in a Free Society, A Report by the President's Commission on Law Enforcement and Administration of Justice, p. 150 (1967).

In its supporting task force report the Commission made the same point in greater detail:

Probation and parole revocation hearings may involve both disputed issues of fact and difficult questions of judicial or administrative judgment. These hearings lack some of the evidentiary and other technical complexities of trials, but where the facts are disputed, the same process of investigating, marshaling, and exhibiting facts is often demanded as at trial. A lawyer for the defense is needed in these proceedings because of the range of facts which will support revocation, the breadth of discretion in the court or agency to refuse revocation even though a violation of the conditions of release is found, and the absence of other procedural safeguards which surround the trial of guilt. Task Force Report: The Courts, Task Force on Administration of Justice, President's Commission on Law Enforcement and Administration of Justice, p. 54 (1967).

The American Bar Association, on the recommendation of its Standing Committee on Legal Aid and Indigent

Defendants, has approved the Minimum Standards for a Defender System as originally promulgated by the National Legal Aid and Defender Association. See 91 A.B.A. Reports 116, 186, 189-90 (1966). The standards provide in part as follows:

Every defender system should:

- 1. Provide legal representation for every person who is without financial means to secure competent counsel when charged with a felony, misdemeanor, or other charge where there is a possibility of a jail sentence.
- 3. Provide representation immediately after the taking into custody or arrest, at the first and every subsequent court appearance and at every stage in the proceeding, including appeal or other post-conviction proceedings to remedy error or injustice. The representation should extend to parole and probation-violation proceedings, extradition, proceedings, and proceedings involving possible detention or commitment of minors or alleged mentally ill persons.
- 8. Provide effectual notice of the available services to all persons who may be in need thereof. [Emphasis added.]

The American Bar Association Project on Minimum Standards for Criminal Justice, under the general chairmanship of Chief Judge J. Edward Lumbard of the Second Circuit, has recently reported a tentative draft of Standards Relating to Providing Defense Services (American Bar Association, Chicago, 1967). The standards were developed by the Advisory Committee on the Prosecution and Defense Functions, headed by Judge Warren E. Burger of the District of Columbia Circuit. The recommended standard on collateral proceedings, at page 40, provides as follows:

4.2 Collateral proceedings.

Counsel should be provided in all proceedings arising from the initiation of a criminal action against the accused, including extradition, mental competency, post-conviction and other proceedings which are adversary in nature, regardless of the designation of the court in which they occur or classification of the proceedings as civil in nature.

The commentary following this standard, at page 43, indicates that the committee intended the standard to apply to any probation revocation proceeding that is adversary in nature.

The most useful way to view the scholarly writing and model legislation in this field is to line it up in chronological order. The first important study was the Attorney General's Survey of Release Procedures, Department of Justice, Washington, 1939, which included a 479-page report on Probation (Volume II). Provisions for notice and hearing are discussed at pages 328-33, but scarcely anything is said about a right to counsel, either retained or assigned. Wiehofen, writing in 1942, also directed his attention to the hearing, or the need for one. "Revoking Probation, Parole or Pardon Without a Hearing," 32 J. Crim. L. Crim. & Pol. Sci. 531. Two student notes published in the 1950's also concentrate on Due Process rights connected with the hearing, but they include the right to counsel. 28 So. Cal. L. Rev. 158 (1955); 59 Colum. L. Rev. 311 (1959). The Columbia note urges that a right to retained counsel be recognized, but hesitates as to the right of assigned counsel.

Also in this period the National Probation and Parole Association (now the National Council on Crime and Delinquency) published a revised edition of its Standard Probation and Parole Act in 1955. Section 17 of the Act requires that a hearing be held when a violation of probation is charged, although the hearing may be "informal or summary."

In 1962, the National Council on Crime and Delinquency published Standards and Guides for Adult Probation.

This book says at page 55:

Every alleged violation need not result in a hearing by the judge. Many times the probation officer and judge in informal conversation can reach a decision without a hearing. The probationer should be informed of the specific violation and should be allowed representation by counsel at the hearing. The hearing should be informal.

The next pronouncement from the National Council on Crime and Delinquency was in a book written by its staff counsel and published in 1963:

Most of the rulings and probably the better practice require that the court conduct a hearing on the alleged violation, that the hearing be preceded by notice of the charge, that the probationer have a right to be represented by counsel and to rebut the charges, and that charges must be established by substantial evidence. . Rubin, Criminal Correction 207 (1963).

The manuscript having been prepared before the Gideon and related decisions, the author did not consider their implications. These three publications show a growing recognition of the importance of counsel. The Standard Act requires only that a hearing be held. The 1962 manual says that counsel should be allowed if there is a hearing, and implies that a hearing should be held if

there is an issue of fact. The 1963 treatise says that the "better practice" requires a hearing with a right to be represented by counsel.

Sklar, writing in 1962, asserted that the principal elements of fairness in the hearing are reasonable notice, a right of cross examination, and a right to offer evidence. He recognized that counsel can be helpful but was then satisfied not to recommend any extension of the rights to retained and assigned counsel beyond the law as then established by rulings of this Court. Sklar, Revocation of Parole and Adult Probation 251-60, 266 (1962), available by interlibrary loan from Northwestern University School of Law, Chicago; a shorter version is in 55 J. Crim. L., Crim. & Pol. Sci. 175 (1964).

The American Law Institute's Model Penal Code, Proposed Official Draft, 1962, submitted a year before the Gideon and Douglas decisions, has the following provision:

Section 301.4. Notice and Hearing on Revocation or Modification of Conditions of Suspension or Probation

The Court shall not revoke a suspension or probation or increase the requirements imposed thereby on the defendant except after a hearing upon written notice to the defendant of the grounds on which such action is proposed. The defendant shall have the right to hear and controvert the evidence against him, to offer evidence in his defense and to be represented by counsel.

The provision indicates that the ALI recognized the importance of the right to be represented by counsel at a probation violation hearing, although the language does not specifically provide for appointment of counsel for a

defendant who is indigent. Thus the model provision is similar to the Alaska statute construed in State v. Hoffman, 404 P. 2d 644 (1967), as requiring appointment of counsel for an indigent defendant on equal-protection grounds.

Beginning with the article by Professor Kadish, "The Advocate and the Experty-Counsel in the Peno-Correctional Process," 45 Minn. L. Rev. 803 (1961), a different theme is sounded. The importance of counsel, including assigned counsel, is recognized and advocated. See passage quoted in Petitioners' brief at pages 23-24. Other recent publications follow the same theme. Kamisar & Choper, "The Right to Counsel in Minnesota," 48 Minn. L. Rev. 1, 96 (1963); Kean, "Due Process Applied to Hearings for the Revocation of Juvenile Probation," 16 Juv. Ct. Judges J. 178 (1966); Hink, "Application of Constitutional Standards of Protection to Probation," 29 U. Chi. L. Rev. 483, 494 (1962); Comment, 12 Wayne L. Rev. 638. 650-54, 656 (author recognizes need for assigned counsel at least in any formal adversary proceeding). Even a chief federal probation officer in Philadelphia says:

With the recent decisions of the Supreme Court that a defendant be represented by counsel at every step of due process, it would seem that the probationer's attorney should be present at the hearing... DiCerbo, "When Should Probation Be Revoked?" Federal Probation, June, 1966, pp. 11, 15.

This observation is quite significant because it indicates that even in the federal system, where the question of right to counsel has not been decided by this Court, a chief probation officer recommends that assigned counsel be provided.

As a part of the American Bar Foundation survey of defense of indigent persons in 1963-64, judges and prosecutors in each state were asked whether they thought counsel should be provided for indigent persons in probation revocation proceedings under an ideal system, also whether they thought it would be unfair if counsel were not provided. Responses showed that in 16 states a majority of both judges and prosecutors said that counsel should be provided; that in 10 additional states prosecutors alone took this position, and that in 3 states judges alone did so. 1 Silverstein, Defense of the Poor 143-44 (1965); details for each state appear in the state reports, vols. 2 and 3.

As part of its preparation for these cases, NLADA circulated questionnaires to prosecutors located in the same cities as its defender members. The questionnaire included these questions, quite similar to those asked by the American Bar Roundation:

Under an ideal system, assuming the state is represented by counsel, should an indigent defendant be provided with counsel at probation revocation proceedings?

A. Felony (as defined above)	revocation	n?
	·Yes	No
B. Misdemeanor (as defined.ab	ove) revoc	ation?
•	Yes	No
Assuming the state is represent	ed by cour	sel, is it
unfair to an indigent defendant i	f he does	not have
conneal at.		

A.	Felony	(as	defined	above)	revocation	
TO THE			۲		Yes	No
D	30. 34.					No. 1

B. Misdemeanor (as defined above) revocation?

Yes....... No......

NLADA received responses from 37 prosecutors in 15 states. Thirty-four answered the felony part of first question "yes," two said "no," and one said "sometimes." Even on the misdemeanor part of the first question the vote was 26 to 11 if favor of providing counsel. On the second question, for felonies, 26 said "yes," 8 said "no," and two said "not necessarily." For misdemeanors the vote was 21 "yes," 13 "no," and 3 "not necessarily" or "depends on which judge is sitting."

These responses to the American Bar Foundation and NLADA questionnaires seem especially persuasive since they are from people intimately involved in the criminal process—trial judges and prosecuting attorneys. If such a large number of prosecutors—the majority of prosecutors responding in 26 states in the Bar Foundation survey and a strong majority in the NLADA canvass—feel that counsel should be provided, the Court must give the matter careful consideration, for these are officials whose primary function is to represent the interest of the state.

III.

A CONSTITUTIONAL REQUIREMENT OF ASSIGNMENT OF COUNSEL WOULD NOT UNDULY BURDEN THE STATES.

A. Counsel is already being assigned in approximately half the state trial courts in the United States.

As we have pointed out in part II A of our brief, 11 states require appointment of counsel: Alaska, Hawaii, Illinois, Massachusetts, Minnesota, New Mexico, New York (part of the state), Oregon, Pennsylvania, Texas, and Wisconsin. Moreover, counsel is in fact being appointed.

to some extent in at least 24 other states, according to data gathered by Sklar in 1962, by the American Bar Foundation in 1963-64, and by ourselves in 1967, all as set forth in Appendix A. These states are Alabama, Arkansas, California, Colorado, Florida, Georgia, Indiana, Iówa, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Nebraska, New Hampshire, New Jersey, North Carolina, North Dakota, Oklahoma, Rhode Island, South Dakota, Utah, Virginia, and West Virginia. The 11 states in the first group, together with a significant number of counties in the states in the second group, comprise roughly half of the population of the United States, and probably more than half of the criminal prosecutions, since many urban states and counties are included.

Among defender offices representation in probation violation proceedings is quite common. The American Bar Foundation reported that most of the defenders interviewed were handling such cases. 1 Silverstein, Defense of the Poor 143 (1965). Of 50 defender offices replying to the questionnaire we circulated in July, 1967, in connection with these cases, 36 offices located in 14 states reported that they handle such cases, while 14 offices located in 9 states said they do not, usually because under local practice no appointment is made. For example, in 1966 the Philadelphia Defender Association reported 490 cases. Other examples are Syracuse, 30; Fort Lauderdale, 27; Chicago, 211; Brighton, Colorado, 36; Salt Lake City, 25; San Francisco, 374; Santa Clara, 119 (1965 figure).

B. The total number of probation revocations is not large.

The President's Commission on Law Enforcement and the Administration of Justice reported 144,000 persons were placed on adult probation in 1965 in the state courts, and for that year the average daily population of persons on probation was 230,000. Task Force Report: Corrections 202 (1967). Apparently these figures refer to felonies since a separate figure is given for misdemeanors.

Figures on the number and percentage of defendants placed on probation in representative counties can be found in the docket studies in the American Bar Foundation state reports. 2 & 3 Silverstein, Defense of the Poor, passim (1965).

What proportion of the defendants on probation have it revoked? Figures for representative cities for the years 1965 and 1966, as collected by the amicus from probation offices, are given in Appendix B. The first two columns list the number of defendants placed on probation; the last two show the number of revocations. Adding all the figures together, we find that for 1965 revocations were 29% of the number of defendants placed on probation, and for 1966 the figure was 24%. The Attorney General's study reported 19% revocations. Attorney General's Survey of Release Procedures, vol. II, Probation, 335-42 (1939). This study also reported total violations of about 40% of those placed on probation. In the federal system 18% of those on probation in 1965 were removed from probation because of a violation. Annual Report of Director of Administrative Office of United States Courts 127 (1966). The National Council on Crime and Delinquency has informed us by letter that in North Carolina in 1965 the number of probation cases terminated by revocation was 20% of the number received on probation, and for Connecticut the corresponding figure was less than

10%. For Nevada and Utah the figure was also about 10%, as reported to NLADA.

These statistics tend to show that the number of revocations is roughly 20% of the number of cases placed on probation; the number of defendants charged with violations would be somewhat higher, of course, since some violations do not result in revocation. Using this figure of 20%, and the figure of 144,000 persons placed on probation, we find that the number of revocations for all state courts is about 29,000 per year, or even if the 20% ratio is applied to the total caseload of 230,000, the number of cases is no more than 46,000.

C. Counsel can be provided within existing systems of representation.

We have shown that counsel is already being provided in about half the state trial courts, and that in any event the number of cases is not large. Moreover, some defendants can retain private counsel. To meet its present obligations to provide representation to poor persons at the arraignment and trial stage of the prosecution, every trial court has either a defender system or an assigned counsel system. It would be a simple matter to extend this system to probation revocation proceedings. The same lawyer originally assigned could simply be called back to court for this later stage of the case. He would already know the defendant and have a file on the case. Since the proceeding usually takes only a short time, the burden on the lawyer should be minimal.

D. Providing counsel would not interfere with probation administration.

It is sometimes argued that the probation system would suffer if burdened with a system of hearings with attorneys present. The answer to this contention is found in the very large number of probation systems now operating with the presence of retained counsel or assigned counsel or both. Moreover, the National Council on Crime and Delinquency's authoritative handbook, Standards and Guides for Adult Probation (1962) does not even mention this as a possible problem, nor is it readily found in other recent literature on probation.

IV.

FOR CONSTITUTIONAL PURPOSES PROBATION SHOULD BE CHARACTERIZED AS A FORM OF LIBERTY AND NOT A MERE PRIVILEGE OR FAVOR.

The terms "privilege," "favor," or "grace" properly refer to a sentencing court's discretion in granting probation to a convicted defendant, but not to the status of probation itself. It is submitted, however, that these labels do not permit a court unbridled power to revoke probation once it has been granted. Nor, indeed, is it necessary to characterize probation as a privilege. The Illinois Appellate Court put it this way:

Our courts have never taken the view that it is a mere matter of favor or grace to admit a defendant to probation. When an order to that effect is entered by a court, the court has satisfied itself that the defendant is not likely to again engage in an offensive or criminal course of conduct and that the public good does not require that the defendant shall suffer the penalty provided by law. • • • The fact

that a person has been adjudged guilty of a criminal offense and subsequently granted probation should not deprive him of a fair, orderly hearing according to accepted judicial principles and recognized standards of procedure when it is sought to terminate that order. When an order granting probation has been entered and the court has imposed the conditions upon which defendant may be at liberty, the defendant has a right to rely thereon and as long as he complies with those conditions his liberty of action or freedom should not be restricted. • • People v. Price, 24 Ill. App. 2d 364, 377, 164 N.E. 2d 528, 534 (1960).

We submit that this characterization of probation is today more accurate than the dictum in *Escoe* v. *Zerbst*, 295 U.S. 490, 492 (1935): "Probation or suspension of sentence comes as an act of grace to one convicted of a crime. * * " This dictum has been widely quoted in the state courts as a justification for denying a right of assigned counsel and other Due Process rights.

Even if probation is characterized as a privilege or act of grace, it is entitled to considerable protection. This Court and other courts have extended protection to other "privileges" that do not involve a person's liberty, e.g. the right to practice law cannot be denied without a fair hearing that establishes reasonable cause. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Konigsberg v. State Bar of California, 353 U.S. 252 (1957). Furthermore, once the right to practice has been granted, revocation of the right raises entirely different and more substantial problems than are involved in determining whether the privilege should be granted initially. See Massengale v. United States, 278 F. 2d 344 (6th Cir. 1960). Public employment is also generally categorized as a

"privilege" and not a "right," but it too is a privilege that cannot be arbitrarily revoked. Greene v. McElroŷ, 360 U.S. 474 (1959). The receipt of Social Security benefits, doing business with the government, and obtaining a radio operator's license have all been characterized as privileges, not rights, yet they cannot be denied without a fair procedure. Flemming v. Nestor, 363 U.S. 603, 611 (1960); Copper Plumbing & Heating Company v. Campbell, 290 F. 2d 368 (D.C. Cir. 1961). See also Slochower v. Board of Education, 350 U.S. 551 (1956).

It is submitted there is no distinction between "rights" and "privileges" that would compel absolute protection for the former yet justify arbitrary invasion and denial of the latter. There are simply different degrees of protection.

To break out of the right-privilege circle, it would be more useful to speak of a single category of "benefits". This category runs the gamut from the most securely protected activities sanctioned or underwritten by government (such as the practice of the basic professions under government license), to the most ephemeral government gratuities (bonus payments or rewards for valor, for example). Thus, no distinction need be drawn at any arbitrary point between 'rights' and 'privileges'; it need only be recognized that in terms of the interests both of the donor and of the recipient, some forms of government benefits are more valuable than others, and should be more fully safeguarded. But the withdrawal or conditioning of all types of benefits should be analysed according to the same constitutional principles. O'Neil, "Unconstitutional Conditions: Welfare Benefits With Strings Attached," 54 Calif. L. Rev. 443, 445.46 (1966).

What form of "benefit," "privilege," or "grace" is more valuable to an individual probationer than his liberty and

freedom from incarceration? And his right to return to his community, his family and his job, albeit it subject to certain conditional restrictions? The label of "privilege," "favor," or "grace" should not be used to deprive a defendant of these vitally important benefits without full procedural safeguards consistent with our concepts of basic fairness, including the right to counsel. To do so relegates such proceedings to a status having less constitutional and procedural protection than the right to practice law, obtain public employment, or Social Security, or other economic "benefits" referred to above. This, we submit, is intolerable in a proceeding so vital to the liberty and other interests of a defendant, as well as the interests of our society in rehabilitation and not punishment.

CONCLUSION.

For the reasons stated we respectfully submit that the judgments of the Supreme Court of Arizona in these two cases should be reversed, and that the cases should be remanded with directions to issue the writs of habeas corpus and for further proceedings in accordance with the opinion of the Court.

Respectfully submitted,

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August 23, 1967

APPENDIX A

RIGHT TO RETAINED AND ASSIGNED COUNSEL IN PROBATION VIOLATION PROCEEDINGS IN THE STATE COURTS(*)

Alabama

Retained counsel: right recognized. Source: state probation office, Birmingham (1967).

Assigned counsel: not appointed except in Mobile County. Sources: probation office, Birmingham (1967); 2 Silverstein, Defense of the Poor 3 (1965).

(*) Some of the information in this Appendix was collected from questionnaires sent by the National Legal Aid and Defender Association to defender members and probation offices in July, 1967. The responses are indicated in the Appendix by naming the office and its location.

References to Sklar, e.g., under Arizona, are to a master's thesis, Revocation of Parole and Adult Probation (1962), available by interlibrary loan from Northwestern University School of Law, 357 E. Chicago Ave., Chicago, Ill. 60611. He obtained his information from the state probation and parole offices, or, in some instances, the probation office in the most populous county.

probation office in the most populous county.

References to the American Bar Foundation field reports are to the original data gathered by official reporters in each state in a total of 300 sample counties. Research procedure is described in 1 Silverstein, Defense of the Poor 171-81 (1965); the sample counties are listed at pp. 155-69. Data in this Appendix are from Form I, question 8d, as reprinted at p. 191. Further information about the survey can be obtained from the American Bar Foundation, 1155 E. 60th St., Chicago, Ill. 60637.

Alaska

Retained counsel: right recognized. Source: Statutes § 12.55.110.

Assigned counsel: right recognized. Source: State v. Hoffman, 404 P.2d 644 (1967).

Arizona

Retained counsel: right recognized. Sources: State v. Maxwell, 97 Ariz. 162, 398 P.2d 548 (1965) (facts illustrate use of retained counsel); Sklar, p. 161 (1962) (Maricopa County [Phoenix]).

Assigned counsel: right not recognized. Source: American Bar Foundation field reports (1963).

Arkansas

Retained counsel: right recognized. Sources: Gerard v. State, 235 Ark. 1015, 363 S.W.2d 916 (1963) (facts illustrate use of retained counsel); Sklar, p. 161 (1962).

Assigned counsel: appointed in some counties but not in others. Sources: American Bar Foundation field reports (1963); Sklar, p. 161 (1962).

California

Retained counsel; right depends on whether judge holds a hearing; practice varies with different judges and different counties. Source: various public defenders and probation offices in the state (1967).

Assigned counsel: right apparently recognized in some courts and not others; practice varies with different judges

and different counties. See In Re Davis, 37 Cal. 2d 872, 236 P.2d 579 (1951). Source: various public defenders and probation offices in the state (1967).

Colorado

Retained counsel: right recognized, at least in some counties. Source: public defender, Brighton (1967).

Assigned counsel: recognition of right varies according to practice of different judges and in different counties. Source: American Bar Foundation field reports (1963).

Connecticut

Retained counsel: right recognized. Sources: probation office, Hartford; various public defenders (1967).

Assigned counsel: right recognized. Sources: probation office, Hartford, and various public defenders (1967); American Bar Foundation field reports (1963).

Delaware

Retained counsel: right recognized. Source: Sklar, p. 167 (1962) (New Castle County [Wilmington]).

Assigned counsel: right recognized, at least in some cases. Sources: Report of Public Defender (1966); Sklar, p. 157 (1962).

District of Columbia

Retained counsel: right recognized. Source: Legal Aid Agency, Washington (1967).

Assigned counsel: right recognized, but counsel not always appointed. Source: Legal Aid Agency (1967).

Florida

Retained counsel: right recognized. Source: Stats. Ann. § 948.06.

Assigned counsel: right not recognized except in a few counties. Sources: *Thomas* v. *State*, 163 So.2d 328 (Ct. App. 3d Dist. 1964); *Phillips* v. *State*, 165 So.2d 246 (Ct. App. 2d Dist. 1964); various public defenders (1967); American Bar Foundation field reports (1963).

Georgia

Retained counsel: right recognized. Source: Code § 27-2713.

Assigned counsel: appointed in some counties, but not in others; in Atlanta (Fulton County) counsel is appointed on request. Sources: probation offices, Atlanta and Savannah (1967); Legal Aid and Defender Society, Athens (1967); American Bar Foundation field reports (1963).

Hawaii

Retained counsel: right recognized. Source: probation office, Honolulu (1967).

Assigned counsel: right recognized. Sources: Rev. Laws § 253-5, as amended in 1967 by Act 179; American Bar Foundation field report showed appointments being made in 1964.

Idaho

Retained counsel: right apparently denied, although in practice retained counsel may be permitted. Source: Frank-

lin v. State, 87 Idaho 291, 392 P.2d 552 (1964). Cf. State v. Edelblute, 424 P.2d 739 (1967) (facts illustrate use of retained counsel).

Assigned counsel: right not recognized. Source: Franklin v. State, supra.

Illinois

Retained counsel: right recognized. Source: People v. Price, 24 Ill. App. 2d 364, 377, 164 N.E.2d 528, 534 (1960).

Assigned counsel: right recognized. Sources: People v. Price, supra; various public defenders in the state (1967); American Bar Foundation field reports (1963).

Indiana

Retained counsel: right recognized. Source: Rev. Stats. (Burns § 9-2211, as amended 1967, ch. 204 of Acts.

Assigned counsel: recognition of right varies with different judges and in different counties. Sources: public defenders in two counties (1967); 2 Silverstein, Defense of the Poor 218-19 (1965).

Iowa.

Retained counsel: recognition of right apparently varies depending on whether judge holds a hearing. Source: see Curtis v. Bennett, 256 Iowa 1164, 131 N.W.2d 1 (1964), cert. denied, 380 U.S. 958 (1965).

Assigned counsel: practice varies in different counties,but right is generally not recognized. Source: American Bar Foundation field reports (1963).

Kansas

Retained counsel: right is probably recognized. Source: see State v. Nelson, 196 Kan. 592, 412 P.2d 1018 (1966).

Assigned counsel: practice varies in different counties as to appointment. Source: American Bar Foundation field reports (1963).

Kentucky

Retained counsel; right recognized. Sources: Sklar, p. 168 (1962); see Wright v. Commonwealth, 391 S.W.2d 685 (1965).

Assigned counsel: right recognized in Louisville (Jefferson County) but not in other counties. Sources: Jefferson Circuit Clerk (1967); American Bar Foundation field reports (1963).

Louisiana

Retained counsel: right recognized. Source: Sklar, p. 182 (1962).

Assigned counsel: not appointed except sometimes in New Orleans (Orleans Parish) and on request in other parishes. Sources: American Bar Foundation field reports (1964); Sklar, p. 182 (1962).

Maine

Retained counsel: right recognized. Source: Sklar, p. 174 (1962) (Cumberland County [Portland]). Rev. Stats., ch. 27-A, § 8 requires a hearing.

Assigned counsel: right not recognized. Source: American Bar Foundation field reports (1963).

Maryland

Retained counsel: right recognized. Source: Edwardsen v. State, 220 Md, 82, 151 A.2d 132, 136 (1959).

Assigned counsel: right denied, but counsel are usually assigned in Baltimore City. Sources: Edwardsen v. State, supra; Baltimore City probation office (1967).

Massachusetts

Retained counsel: right recognized. Source: may be inferred from Williams v. Commonwealth, 350 Mass. 732, 216 N.E.2d 779 (1966).

Assigned counsel: right recognized. Source: Supreme Judicial Court Rule 10, as construed in Williams v. Commonwealth, supra.

Michigan

Retained counsel: right recognized. Sources: Re McLeod, 348 Mich. 434, 83 N.W.2d 340 (1957) (facts illustrate use of retained counsel); People v. Wood, 2 Mich. App. 342, 139 N.W.2d 895 (1966).

Assigned counsel: right denied. Source: People v. Wood, supra.

Minnesota

Retained counsel: right recognized. Source: Stats. \$ 609.14, subd. 2.

Assigned counsel: right recognized. Source: Stats. § 611.14, subd. (c).

Mississippi

Retained counsel: right recognized. Source: Sklar, p. 168 (1962). Code Ann. § 4004-25 requires that defendant be brought before the court, which implies a right of hearing.

Assigned counsel: right not recognized, except in Pascagoula (Jackson County) and possibly a few other counties. Sources: public defender, Pascagoula (1967); American Bar Foundation field reports (1963); Sklar, p. 168 (1962).

Missouri

Retained counsel: right not recognized, since there is no right to a hearing. Source: State v. Small, 382 S.W. 2d 379 (1965).

Assigned counsel: right not recognized. Source: State v. Small, supra.

Montana

Retained counsel: right uncertain. Rev. Code § 94-9831 provides that hearing may be informal or summary.

Assigned counsel: right not recognized. Sources: Elison, "Assigned Counsel in Montana," 26 Mont. L. Rev. 1, 17-18 (1964); American Bar Foundation field reports (1963).

Nebraska

Retained counsel: right probably recognized. *Phoenix* v. *State*, 162 Neb. 669, 77 N.W.2d 237 (1956) requires a fair hearing.

Assigned counsel: appointed in some counties but not in others. Source: American Bar Foundation field reports (1963).

Nevada

Retained counsel: right recognized. Sources: Sklar, p. 169 (1963); Las Vegas public defender (1967).

Assigned counsel: right denied. Source: Shum v. Fogliani, 413 P.2d 495 (1966). But Las Vegas public defender reports that he appears at hearings on violations.

New Hampshire

Retained counsel: right recognized. Source: Sklar, p. 183. Rev. Stats. Ann. §504:4 provides for summary hearing.

Assigned counsel: right not recognized, unless requested. Source: American Bar Foundation field reports (1963); Sklar, p. 183 (1962) (unqualified "no").

New Jersey

Retained counsel: right recognized. Source: State v. Moretti, 50 N.J. Super. 223, 141 A.2d 810 (1958) (facts illustrate use of retained counsel).

Assigned counsel: appointed in some counties but not in others, or only on request. Source: American Bar Foundation field reports (1963).

New Mexico

Retained counsel: right recognized. Sources: Sklar, p. 163 (1962) (1st Dist.); Blea v. Cox, 75 N.M. 265, 403 P.2d 201 (1965).

Assigned counsel: right recognized. Source: Blea v. Cox, supra.

New York

Retained counsel: right recognized in some parts of the state, including New York City and 4th Appellate Department. Sources: various defender, legal aid, and probation offices in the state (1967); Sklar, p. 175 (1962). Code Crim. Pro. § 935 requires a hearing.

Assigned counsel: right recognized by decision in 4th Appellate Department and practice in New York City and some other counties. Old decision in 3d Department is contra. Sources: various defender, legal aid, and probation offices (1967); People v. Hamilton, 26 A.D. 2d 134, 271 N.Y.S. 2d 694 (4th Dept. 1966); People v. St. Louis, 3 A.D. 2d 883, 161 N.Y.S. 2d 170 (3d Dept. 1957); American Bar Foundation field reports (1963); Note, 59 Colum. L. Rev. 311, 329 (1959).

North Carolina

Retained counsel: right recognized. Source: Sklar, p. 176 (1962). See State v. Haddock, 241 N.C. 182, 82 S.E.2d 548 (1954) (hearing required).

Assigned counsel: appointed in some counties, but not in others. Source: American Bar Foundation field reports (1963).

North Dakota

Retained counsel: right probably recognized. Source: American Bar Foundation field reports (1963).

Assigned counsel: right recognized. Source: American Bar Foundation field reports (1963).

Ohio

Retained counsel: right recognized. Source: Thomas v. Maxwell, 175 Ohio St. 233, 193 N.E.2d 150, 152 (1963).

Assigned counsel: right denied. Source: Thomas v. Maxwell, supra. However, Toledo Legal Aid Society reports being appointed in some cases.

Oklahoma

Retained counsel: right recognized. Sources: probation office, Tulsa (1967); Sklar, p. 158 (1962) (Tulsa and Oklahoma Counties).

Assigned counsel: appointed in some counties but not in others. Source: American Bar Foundation field reports (1963). Cf. Ex Parte Boyd, 73 Okla. Crim. 441, 122 P.2d 162 (1942), syllabus point 6 (not discussed in opinion).

Oregon .

Retained counsel: right recognized. Source: Gebhart v. Gladden, 243 Ore. 145, 412 P.2d 29 (1966); Perry v. Williard, 427 P.2d 1020 (1967).

Assigned counsel: right recognized. Gebhart v. Gladden, Perry v. Williard, supra.

Pennsylvania

Retained counsel: right recognized only if the practice of the local judge is to hold a hearing. Hearings are held in Philadelphia and other populous counties. Stats. Ann., tit. 19, § 1084 does not require a hearing. Source: defender offices in several counties of the state (1967).

Assigned counsel: right recognized if a hearing is held. Source: Com. ex rel. Remeriez v. Maroney, 415 Pa, 534, 204 A.2d 450 (1964).

Rhode Island

Retained counsel: right recognized. Sources: Harris v. Langlois, 202 A.2d 288 (1964), cert. denied, 379 U.S. 866 (1965) (facts illustrate use of retained counsel); Sklar, p. 169 (1962).

Assigned counsel: right recognized. Source: 3 Silverstein, Defense of the Poor 657 (1965).

South Carolina

Retained counsel: right recognized. Source: State ver Clough, 220 S.C. 390, 68 S.E.2d 329 (1951) (facts illustrate use of retained counsel; fair hearing required).

Assigned counsel: right not recognized. Source: American Bar Foundation field reports (1963).

South Dakota

Retained counsel: right uncertain. Sources: Sklar, p. 164 says "no" (1962); cf. Application of Jerrel, 77 S.D. 487, 93 N.W.2d 614 (1958) (fair hearing required).

Assigned counsel: appointed in some counties but not in others. Source: American Bar Foundation field reports (1963).

Tennessee

Retained counsel: right recognized. Source: Code § 40-2907.

Assigned counsel: right not recognized. Source: American Bar Foundation field reports (1963).

Texas

Retained counsel: right recognized. Sources: Code of Crim. Pro. art. 42.12, § 3b; probation office, Dallas (1967); defender offices, Houston, Edinburg (1967).

Assigned counsel: right recognized. Source: Code of Crim. Pro. art. 42.12, § 3b, at least when probation is recommended by a jury and probably in all cases.

Utah

Retained counsel: right recognized. Source: defender office, Salt Lake City (1967).

Assigned counsel: appointed by some judges but not others. Source: Mazor, "The Right to be Provided Counsel," 9 Utah L. Rev. 50, 74 (1964).

Vermont

Retained counsel: right recognized. Source: Sklar, p. 184 (1962). Stats. Ann., tit. 28, § 1015 provides that judge "may inquire summarily."

Assigned counsel: right not recognized. Source: American Bar Foundation field reports (1964); Sklar, p. 184 (1962).

Virginia

Retained counsel: right probably recognized. Source: Griffin v. Cunningham, 205 Va. 349, 136 S.E.2d 840 (1964) (fair hearing required).

Assigned counsel: appointed in some cities and counties, but not in others. Source: American Bar Foundation field reports (1963).

West Virginia

Retained counsel: right uncertain. Code § 62-12-10 prevides for summary hearing. Local practice apparently permits counsel in at least some counties. Source: Sklar, pp. 1, 184 (1962) (Kanawha County [Charleston]).

Assigned counsel: appointed in some counties, but not in others. Source: American Bar Foundation field reports (1963).

Wisconsin

Retained counsel: right recognized. Source: Smith v. State, 33 Wis.2d 695, 148 N.W,2d 39 (1967).

Assigned counsel: right recognized, Source: Smith v. State, supra.

Wyoming

Retained counsel: right recognized. Source: Defender Aid Program, University of Wyoming (1967).

Assigned counsel: right not recognized. Sources: Defender Aid Program, University of Wyoming (1967); American Bar Foundation field reports (1963).

APPENDIX B

PROBATION AND REVOCATION IN SELECTED CITIES(*)

The time			1.2.4		
	New Probation Cases		Rev	Revocations	
City	1965	1966	1965	1966	
Atlanta	1,245	1,292	240	334	
Baltimore	972	764	153	173	
Boulder, Colo.	96	116	9	16	
Cleveland	733	699	135	88	
Columbus	239		79	. —	
Crown Pt., Ind.	663	572	33	. 21	
Dallas	.957	1,220	135	119	
Denver, Cole.	133	133	. 8	6	
Edinburg, Texas	- 28	54	6	4	
Gainesville, Fla.	93	73	2	. 2	
Hartford	2,153	2,120	646	320	
Houston, Texas	679	729	121	111	
Honolulu	249	231	24	33	
Joliet, Ill.	25	30	3	4	
Kansas City, Kan.	57	44	2	1	
Kansas City, Mo.	15	. 4	4	13	
Los Angeles	5,862	5,653	2,607	4,027	
Martinez, Cal.	292	339	74	. 58	
Mayville, N. Y.	120	101	10	13	
		0 1			

^(*) Source: Information from local probation offices sent to National Legal Aid and Defender Association in 1967. The city usually includes cases for the surrounding county.

	New Probation Cases		Revocations	
City	New Pro	1966	1965	1966
Mineola, N. Y.	755	693	27	- 18
New London :	36	46	25	. 9
New Haven	101	106	8	. 11
Oakland	878	762	256	268
Philadelphia	3,691	4,233	350	249
Sacramento	309	310	129	123
St. Louis City	1,404	693	85	139
St. Louis County	199	216	58	64
St. Paul	92	74	12	21
San Diego	880	1,041	262	248
Santa Ana, Cal.	523	540	214	196
Santa Clara, Cal.	419	450	81	123
Savannah	68	87	4	6
Scranton	58	37	. 50	
Syracuse	14	18	2	3
Tulsa	65	40	22	33
Utica, N. Y.	84	52	. 8	1
Visalia, Cal.	163	145	27	. 19
Williamsport, Pa.	20	40	2	3
Total	24,364	23,747	5,913	6,877

SUPREME COURT OF THE UNITED STATES

Nos. 16 AND 22.—OCTOBER TERM, 1967.

Jerry Douglas Mempa, Petitioner, 16 v.

B. J. Rhay, Superintendent, Washington State Penitentiary.

William Earl Walkling, Petitioner,

Washington State Board of Prison Terms and Paroles. On Writs of Certiorari to the Supreme Court of Washington.

[November 13, 1967.]

Mr. Justice Marshall delivered the opinion of the Court.

These consolidated cases raise the question of the extent of the right to counsel at the time of sentencing where the sentencing has been deferred subject to probation.

Petitioner Jerry Douglas Mempa was convicted in the Spokane County Superior Court on June 17, 1959, of the offense of "joyriding," Wash. Rev. Code § 9.54.020. This conviction was based on his plea of guilty entered with the advice of court-appointed counsel. He was then placed on probation for two years on the condition, interalia, that he first spend 30 days in the county jail, and the imposition of sentence was deferred pursuant to Wash. Rev. Code §§ 9.95.200, 9.95.210.1

About four months later the Spokane County prosecuting attorney moved to have petitioner's probation

¹ The State suggests that the Supreme Court of Washington was in 'error in stating that Mempa received a deferred rather than a suspended sentence, but we accept that court's characterization of the sentence as supported by the record.

revoked on the ground that he had been involved in a burglary on September 15, 1959. A hearing was held in the Spokane County Superior Court on October 23, 1959. Petitioner Mempa, who was 17 years old at the time, was accompanied to the hearing by his stepfather. He was not represented by counsel and was not asked whether he wished to have counsel appointed for him. Nor was any inquiry made concerning the appointed counsel who had previously represented him.

At the hearing Mempa was asked if it was true that he had been involved in the alleged burglary and he answered in the affirmative. A probation officer testified without cross-examination that according to his information petitioner had been involved in the burglary and had previously denied participation in it. Without asking petitioner if he had anything to say or any evidence to supply, the court immediately entered an order revoking petitioner's probation and then sentenced him to 10 years in the penitentiary, but stated that he would recommend to the parole board that Mempa be required to serve only a year.

In 1965 Mempa filed a pro se petition for a writ of habeas corpus with the Washington Supreme Court, claiming that he had been deprived of his right to counsel at the proceeding at which his probation was revoked and sentence imposed. The Washington Supreme Court denied the petition on June 23, 1966, by a vote of six to three. 68 Wash. 2d 882, 416 P. 2d 104. We granted

² Under Washington procedure the trial judge is required by statute to impose the maximum sentence provided by law for the offense, Wash. Rev. Code § 2.95.010, but is also required, along with the prosecuting attorney, to make a recommendation to the parole board of the time that the defendant should serve accompanied by a statement of the facts concerning the crime and any other information about the defendant deemed relevant. Wash. Rev. Code § 9.95.030. However, it is the parole board that actually determines the time to be served. Wash. Rev. Code § 9.95.040.

certiorari to consider the questions raised. 386 U.S. 907 (1967).

Petitioner William Earl Walkling was convicted in the Thurston County Superior Court on October 29, 1962, of burglary in the second degree on the basis of his plea of guilty entered with the advice of his retained counsel. He was placed on probation for three years and the imposition of sentence was deferred. As conditions of his probation he was required to serve 90 days in the county jail and make restitution. On May 2, 1963, a bench warrant for his arrest was issued based on a report that he had violated the terms of his probation and had left the State.

On February 24, 1964, Walkling was arrested and charged with forgery and grand larceny. After being transferred back to Thurston County he was brought before the court on May 12, 1964, for a hearing on the petition by the prosecuting attorney to revoke his probation. Petitioner then requested a continuance to enable him to retain counsel and was granted a week. On May 18, 1964, the hearing was called and Walkling appeared without a lawyer. He informed the court that he had retained an attorney who was supposed to be present. After waiting for 15 minutes the court went ahead with the hearing in the absence of petitioner's counsel. He was not offered appointed counsel and would not have had counsel appointed for him had he requested it. ·Whether he made such a request does not appear from the record.

At the hearing a probation officer presented hearsay testimony to the effect that petitioner had committed the acts alleged in the 14 separate counts of forgery and 14 separate counts of grand larceny that had been charged against petitioner previously at the time of his arrest. The court thereupon revoked probation and imposed the maximum sentence of 15 years on Walkling on his prior

second degree burglary conviction. Because of the failure of the State to keep a record of the proceeding, nothing is known as to whether Walkling was advised of his right to appeal. He did not, however, take an appeal.

In May 1966 Walkling filed a habeas corpus petition with the Washington Supreme Court, claiming denial of his right to counsel at the combined probation revocation and sentencing proceeding. The petition was denied on the authority of the prior decision in *Mempa* v. *Rhay*, supra. We granted certiorari, 386 U. S. 907 (1967), and the cases were consolidated for argument.

In 1948 this Court held in Townsend v. Burke, 334 U.S. 736 (1948), that the absence of counsel during sentencing after a plea of guilty coupled with "assumptions concerning his criminal record which were materially untrue" deprived the defendant in that case of due process. Mr. Justice Jackson there stated in conclusion, "In this case, counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner." Id., at 741. Then in Moore v. Michigan, 355 U.S. 155 (1957). where a denial of due process was found when the defend ant did not intelligently and understandingly waive counsel before entering a plea of guilty, this Court emphasized the prejudice stemming from the absence of counsel at the hearing on the degree of the crime following entry of the guilty plea and stated, "The right to counsel is not a right confined to representation during the trial on the merits." Id., at 160.

In Hamilton v. Alabama, 368 U.S. 52 (1961), it was held that failure to appoint counsel at arraignment deprived the petitioner of due process, notwithstanding the fact that he simply pleaded not guilty at that time, be-

cause under Alabama law certain defenses had to be raised then or be abandoned. See also Reece v. Georgia, 350 U. S. 85 (1955), and White v. Maryland, 373 U. S. 59 (1963).

All the foregoing cases, with the exception of White, were decided during the reign of Betts v. Brady, 316 U.S. 455 (1942), and accordingly relied on various "special circumstances" to make the right to counsel applicable. In Gideon v. Wainwright, 372 U.S. 335 (1963), however, Betts was overruled and this Court held that the Sixth Amendment as applied through the Due Process Clause of the Fourteenth Amendment was applicable to the States and, accordingly, that there was an absolute right to appointment of counsel in felony cases.

There was no occasion in Gideon to enumerate the various stages in a criminal proceeding at which counsel was required, but Townsend, Moore, and Hamilton, when the Betts requirement of special circumstances is stripped away by Gideon, clearly stand for the proposition that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected. In particular, Townsend v. Burke, supra, illustrates the critical nature of sentencing in a criminal case and might well be considered to support by itself a holdin, that the right to counsel applies at sentencing. Many lower courts have concluded that the Sixth Amendment right to counsel extends to sentencing in federal cases.

The State, however, argues that the petitioners were sentenced at the time they were originally placed on

³ See Kadish, The Advocate and the Expert—Counsel in the Peno-Correctional Process, 45 Minn. L. Rev. 803, 806 (1961).

⁴ E. g., Martin v. United States, 182 F. 2d 225 (C. A. 5th Cir. 1950); McKinney y. United States, 208 F. 2d 844 (C. A. D. C. Cir. 1953); Nunley v. United States, 283 F. 2d 651 (C. A. 10th Cir. 1960).

probation and that the imposition of sentence following probation revocation is, in effect, a mere formality comprising part of the probation revocation proceeding. It is true that sentencing in Washington offers fewer opportunities for the exercise of judicial discretion than in many other jurisdictions. The applicable statute requires the trial judge in all cases to sentence the convicted person to the maximum term provided by law for the offense of which he was convicted. Wash. Rev. Code § 9.95.010. The actual determination of the length of time to be served is to be made by the Board of Prison Terms and Paroles within six months after the convicted person is admitted to prison. Wash. Rev. Code § 9.95.040.

On the other hand, the sentencing judge is required by statute, together with the prosecutor, to furnish the Board with a recommendation as to the length of time that the person should serve, in addition to supplying it with various information about the circumstances of the crime and the character of the individual. Wash. Rev. Code § 9.95.030. We were informed during oral argument that the Board places considerable weight on these recommendations, although it is in no way bound by them. Obviously to the extent such recommendations are influential in determining the resulting sentence, the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent.

Even more important in a case such as this is the fact that certain legal rights may be lost if not exercised at this stage. For one, Washington law provides that an appeal in a case involving a plea of guilty followed by probation can only be taken after sentence is imposed following revocation of probation. State v. Farmer, 39 Wash. 2d 675, 237 P. 2d 737 (1951). Therefore in a case where an accused agreed to plead guilty, although he had a valid defense, because he was offered probation, absence of counsel at the imposition of the deferred sentence might well result in loss of the right to appeal. While ordinarily appeals from a plea of guilty are less frequent than those following a trial on the merits, the incidence of improperly obtained guilty pleas is not so slight as to be capable of being characterized as de minimis. See, e. g., United States ex rel. Elksnis v. Gilligan, 256 F. Supp. 244 (D. C. S. D. N. Y. 1966). Cf. Machibroda v. United States, 368 U. S. 487 (1962).

Likewise the Washington statutes provide that a plea of guilty can be withdrawn at any time prior to the imposition of sentence, Wash Rev. Code § 10.40.175, State v. Farmer, supra, if the trial judge in his discretion finds that the ends of justice will be served, State v. Shannon, 60 Wash. 2d 883, 376 P. 2d 646 (1962). Without undertaking to catalog the various situations in which a lawyer could be of substantial assistance to a defendant in such a case, it can be reiterated that a plea of guilty might well be improperly obtained by the promise to have a defendant placed on the very probation the revocation of which furnishes the occasion for desiring to withdraw the plea. An uncounseled defendant might very likely be unaware of this opportunity.

⁵ State v. Proctor, 68 Wash. 2d 817, 415 P. 2d 634 (1966), modified the Farmer rule only to permit an appeal following placement on probation in cases involving (1) a contested trial and (2) the imposition of a jail term or fine as a condition of probation.

⁶ See generally D. Newman, Conviction—The Determination of Guilt or Innocence Without Trial (1966); A. Enker, "Perspectives on Plea Bargaining," in The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 108-119 (1967).

The two foregoing factors assume increased significance when it is considered that, as happened in these two cases, the eventual imposition of sentence on the prior plea of guilty is based on the alleged commission of offenses for which the accused is never tried.

In sum, we do not question the authority of the State of Washington to provide for a deferred sentencing procedure coupled with its probation provisions. Indeed, it appears to be an enlightened step forward. All we decide here is that a lawyer must be afforded at this proceeding whether it be labeled a revocation of probation or a deferred sentencing. We assume that counsel appointed for the purpose of the trial or guilty plea would not be unduly burdened by being requested to follow through at the deferred sentencing stage of the proceeding.

The judgments below are reversed and the cases are remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.